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1058
No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY
(a corporation),

Appellant,

VS.

ORO ELECTRIC CORPORATION
(a corporation),

Appellee.

Filed

MAY 18 1917

F. D. Monckton,
Clerk

BRIEF FOR APPELLANT.

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Filed this.....*day of May, 1917.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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Statement of Case.

(References are to pages of printed transcript.)

This was an action brought by the complainant and appellee, Oro Electric Corporation, against the defendant and appellant Bader Gold Mining Company, for the purpose of quieting the title of plaintiff to a certain water ditch in Butte County, State of California, known as the "Nickerson Ditch", and for the purpose of procuring an injunction restraining and enjoining the defendant from taking any water out of that ditch. The bill of complaint, in

substance, alleges that the complainant is engaged in the business of generating and producing by water power or other means, electric current for light, heat and power, and of transmitting, distributing, selling, and supplying power to the public; that it owns and possesses a certain water ditch in the County of Butte, State of California, known as the "Nickerson Ditch", which is described as extending in a general southerly and southwesterly direction from its intake at Little Butte Creek in the northeast quarter of Section 36, Township 23 North, Range 3 East, M. D. B. & M., through Sections 1, 2, 11, 12 and 13, in Township 22 North, Range 3 East, and Sections 18, 19 and 30 in Township 22 North, Range 4 East, M. D. B. & M., the Kunkle Reservoir in Section 3, Township 22 North, Range 4 East, M. D. B. & M; that the complainant uses the ditch during the summer season for the purpose of distributing water to its customers for irrigation, and during the other seasons of the year for the purpose of conveying water to the Kunkle Reservoir, for use in operating its power plants. It is then alleged that the defendant asserts some claim in that portion of the ditch situated in Section 36, Township 23 North, Range 3 East, and Sections 1 and 2, Township 22 North, Range 3 East; that it claims the right to enter upon the ditch and take water therefrom without making compensation to the complainant; that at divers times designated in the complaint during the year 1912 it did forcibly enter upon and open the ditch

at a point in the southeast quarter of the northwest quarter of Section 1, Township 22 North, and injured the banks thereof and took large quantities of water therefrom, without making or tendering any compensation. It is asserted that the claims of defendant are without right or foundation; that as a result of its acts, the operation of complainant's power plants has been interfered with, and that defendant threatens to continue to assert its claims and to enter upon and interfere with the ditch and take water therefrom. By the prayer it is asked that the claims of the defendant be held invalid and without right; that it be decreed the defendant has no estate, right, title or interest in and to the ditch and no right to take water therefrom; that complainant is the owner of the ditch and that the defendant be forever restrained and enjoined from asserting any claim thereto or any estate or interest therein, or from entering upon or in any way from interfering with the ditch or taking water therefrom.

In its answer defendant admitted that it asserted a claim in that portion of the Nickerson Ditch situated in Section 36, Township 23 North, Range 3 East, and in Section 1, Township 22 North, Range 3 East, but denied that it asserted any claim to any portion of the ditch in Section 2. It admitted that it claimed the right to enter upon the ditch and take water therefrom without making compensation to the complainant and admitted that it took large quantities of water from the ditch but denied that

it injured the banks, or that the taking of the water was without right or foundation, or otherwise wrongful. It further alleged that it was without knowledge of the facts concerning its ownership and possession of the Nickerson Ditch alleged by complainant.

By way of affirmative defense, the defendant alleged that ever since the 17th day of March, 1899, it had been the owner of the right to use and in possession of the use of 500 miners' inches of water flowing in Little Butte Creek to be diverted therefrom at a point commonly known as "The Old Thompson Flat or Delaplain Ditch head-dam" on Section 36, Township 23 North, Range 3 East, and conducted therefrom through a flume and ditch in a southerly direction across a portion of Section 36, and across a portion of Section 1, Township 22 North, Range 3 East, to the place of use at defendant's mine located on the northeast quarter of Section 1; that defendant during all times since the 17th day of March, 1899, had used 500 miners' inches of water in its business of mining at said mine, and except as thereafter alleged, had conducted the water through its flume and ditch; that defendant's ditch headed on Little Butte Creek below the head of the Nickerson Ditch as described in plaintiff's bill of complaint; that plaintiff since on or about the year 1888, had been by itself and its predecessors in interest, according to the information and belief of defendant, in the possession and in the enjoyment of an easement to maintain

the Nickerson Ditch across the lands of the defendant and other owners of adjoining land; that said Nickerson Ditch was built and maintained for the purpose of taking from Little Butte Creek water emptied therein above the head of the Nickerson Ditch by the Snow Water Ditch, which latter ditch conducted water to Little Butte Creek from a source without the watershed of that creek. It was then alleged that during the summer of 1906 complainant enlarged its ditch at the head thereof and did unlawfully and without right divert all the water from Little Butte Creek so that no water flowed therein to the head of defendant's ditch, thereby depriving defendant of the use of 500 inches of water owned by it; that immediately and thereupon defendant recaptured its water flowing in the Nickerson Ditch by opening a gateway therein and letting run therefrom water only sufficient for its use, not to exceed in quantity 500 miners' inches; and that it has continued to do so from the year 1906 to the time of the commencement of the action.

As a further affirmative defense, defendant alleged that it had at no time used the Nickerson Ditch for any purpose inconsistent with the enjoyment and use of any easement right possessed by the complainant across the lands of the defendant.

As further defenses the defendant alleged that complainant's cause of action was barred by the Statute of Limitations; that complainant had been

guilty of laches in that it had not brought its action within a reasonable time after the commencement of the acts of the defendant complained of, and further, that the defendant had been in the quiet, open and continuous possession of the right to conduct through the Nickerson Ditch 500 miners' inches of water to the use of which defendant was entitled, and to take the same from the ditch at a point near defendant's mine, holding and claiming said right adversely to all other persons under a claim of a legal right so to do for more than five years before the commencement of the action. This claim of prescriptive right was also set up by way of cross-complaint.

After the issues were formed the cause was referred to the Standing Master in Chancery with directions to take and report the testimony together with the Master's findings and conclusions thereon (18). After a trial of the issues before the Master he prepared a draft report of his findings and conclusions, and, pursuant to the usual custom, gave the parties a definite time within which to object to any portions of that report. After the filing of objections by defendant to said draft report (66-102), the Master prepared his final report and filed it with the court. In this report he found and determined that complainant was entitled to the relief prayed for (21-66). By stipulation the objections and exceptions theretofore taken by defendant to the draft report of the Master stood as the exceptions taken to his final

report (102-104). The trial court overruled all of the exceptions and on the 24th day of May, 1915, entered a judgment finding and determining that defendant had no right, title or interest in or to the Nickerson Ditch, and ordered that a perpetual injunction issue forever enjoining and restraining it from making any claim thereto or from taking any water therefrom without making or tendering compensation to the complainant therefor. It is from this judgment that the present appeal is prosecuted.

Statement of Facts.

It is proper that a brief statement of the salient facts developed at the trial should be made, to the end that the court may become acquainted with the situation as disclosed by the evidence. While a great many of the facts are without controversy, a considerable number were in issue. The statement which follows, therefore, is in some measure controversial, though it is our purpose to make it as fair as possible, stating the respective contentions of the parties on the disputed facts, and briefly commenting on them.

The Bader Gold Mining Company, the defendant and appellant, is the owner of the northwest quarter and of a portion of the northeast quarter and southeast quarter of Section 1, Township 22 North, Range 3 East, M. D. B. & M. situated in Butte County, California. On this property it has for

many years operated and is now operating a placer gold mine. In conducting operations at this mine it has at all times been necessary and now is necessary to use water in varying quantities. To the west of the mine there extends through defendant's property in a general northerly and southerly direction a stream of considerable size known as Little Butte Creek. This stream has its source in the mountains several miles to the north and then flows in a general southerly direction through the lands of defendant and others to the Feather River. To the east of the mine (viz., on the opposite side of the mine to the creek) there also extends through defendant's property in a general northerly and southerly direction, a water ditch commonly known as the "Nickerson Ditch". This ditch extends from its intake on Little Butte Creek about a mile north of defendant's property, thence through the land of defendant and others to the Kunkle Reservoir, its general course being that indicated by complainant in its bill. Below the head-dam of the Nickerson Ditch there is another ditch known variously as the "Walker & Wilson Ditch", "West Ditch", "Powers Ditch" or the "Old Thompson Flat Ditch". This ditch has its intake in Section 36, immediately north of the property of defendant, thence runs through the property of defendant and others to a point several miles below where it joins with the Nickerson Ditch. South of the intake of the Powers Ditch (which term will be hereafter used to designate the ditch just mentioned)

there is a third ditch which extends from its intake at Little Butte Creek to the Mineral Slide Mine situated a mile or two east of the creek. This ditch does not touch the lands of defendant. Above the intakes of all of these ditches, and several miles above the lands of defendant, there was a further ditch known as the "Snow Ditch". This ditch extended from the west branch of the Feather River at a point nearly opposite the Village of Inskip, and thence ran in a general southwesterly direction for about eight miles to Little Butte Creek. All of the foregoing ditches are involved in one way or another in the present controversy.

It appears from the evidence that some time prior to the year 1888 one A. A. Nickerson was interested as the owner or one of the chief owners of the Mineral Slide Mine. This mine was a placer mine and was operated by water taken from Little Butte Creek through the Mineral Slide Ditch heretofore referred to. The water taken through this ditch and used at the Mineral Slide Mine, however, was not the natural water of Little Butte Creek, but was water which was emptied into Little Butte Creek from the west branch of the Feather River, outside of its watershed, by the Snow Ditch. At this time, apparently, Nickerson claimed no interest in the natural flow of Little Butte Creek as distinguished from the artificial flow caused by the water of the Snow Ditch. It appears to have been the custom to measure the waters from the Snow Ditch as they flowed in Little Butte Creek

past the head dam of the Powers Ditch. The proprietors of this latter ditch seemingly claimed a first right to the natural waters of Little Butte Creek, a claim which was evidently recognized or acquiesced in by Nickerson.

In the year 1888 Nickerson acquired an old abandoned ditch right known as the "Delaplain" Ditch which was substantially located upon the present course of the Nickerson Ditch. On this line he built a new ditch thereafter to be known as the "Nickerson Ditch", and being the ditch here in controversy. It appears that in acquiring Delaplain's rights and building a new ditch, it was his purpose to carry any surplus of water from the Snow Ditch which he did not need at the Mineral Slide Mine to the farming region below for irrigation, his plan including the subdivision and sale of farming land, with water rights from the Nickerson Ditch. He retained the title of the ditch from the time it was built until 1890, during which time, in recognition of the rights of the owners of the Powers Ditch, he permitted the natural water of Little Butte Creek to flow past his head dam, retaining and diverting only the Snow Ditch water. (The early history and use of the Nickerson Ditch will be found in the testimony of D. B. North, 127-134, 289-294.)

In July, 1890, Nickerson conveyed the Nickerson and Snow Ditches to one Frank McLaughlin (359). McLaughlin retained title until October 4th, 1897, when he conveyed the ditches and water rights to

Walter Cutting (360). On April 30th, 1898, Cutting conveyed the Nickerson and Snow Ditches and the water rights to the Oroville Water Company (362). They were transferred from the Oroville Water Company to the Oro Water, Light & Power Company on August 15th, 1905 (364), and by the latter company to the complainant, Oro Electric Corporation, on March 12th, 1912 (367). The Nickerson and Snow Ditches and the water rights connected therewith were described by Nickerson in his deed to McLaughlin, by McLaughlin in his deed to Cutting, and by Cutting in his deed to Oroville Water Company, as follows:

“That certain ditch and water right taken from the west branch of the Feather River at a point nearly opposite the village of Inskip and about five miles above Powell’s said ditch running thence in a southwesterly direction for about 8 miles to its terminus at or near Hasty’s mill; said ditch conducting the water by ditch and flume on top of and across the Dog-town Ridge; said ditch being commonly and generally known as the Snow ditch, also all additions to said ditch made by the party of the first part or his grantors to convey the waters thereof to or near Paradise, and all rights which the party of the first part has or may have obtained under a certain deed dated the 14th day of March, 1888, from Charles Delaplain to the party of the first part, recorded in Volume 30 of Deeds, page 36, Butte County Records. Also by a certain deed from the Magalia Consolidated Mining Company to A. A. Nickerson recorded in Book 30 of Deeds, Butte County Records, page 30, so far as the same appertain to said water rights, together with all appurtenances, rights of way,

additions, extensions, head dams, flumes and improvements on said ditch or any part thereof."

In the deed of the Oroville Water Company to Oro Water, Light & Power Company, the ditches and water rights are described as follows:

"Also all the right, title, claim and interest which the said party of the first part now has or may hereafter acquire in and to that certain property known as the Hendricks Ditch; Also all the right, title, claim and interest which the said party of the first part may now have or may hereafter acquire in and to that certain property known as the Snow Ditch and Nickerson Ditch and described in that certain deed from A. A. Nickerson to Frank McLaughlin, recorded in Book 33 of Deeds, page 397, Records of Butte County; Also all that certain ditch and water right known as the Nickerson Ditch conveying water from Little Butte Creek near the town of Magalia to the town of Paradise in said County of Butte; Also all right, title and interest which the party of the first part now has or may hereafter acquire to that certain water ditch in Kimsheew, Oregon and Hamilton Townships, County aforesaid, formerly known as the Walker and Wilson Ditch, and now known as the West Ditch."

In the deed from Oro Water, Light & Power Company to the Oro Electric Corporation, the complainant, the ditches and water rights are described as follows:

"Also that certain water right and dam known as the Nickerson head dam whereby water is taken from Little Butte Creek near the Town of Magalia in Section 36, Township 23, N.,

R. 3 E., M. D. M., in Butte County California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22 N., R. 3 E., M. D. M., in Butte County, California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22 N., R. 4 E., M. D. M., in Butte County, California.

“Also all and singular the plants, electric works, water, power works, power houses or other stations or buildings for the generation, transmission, or storage of power or electricity, and the fixtures, fittings and equipment thereof, including all dynamos, engines, boilers, machinery, regulators, meters, convertors, switchboards, shafting, belting and other appliances, and all lines, mains, feeders, poles, mast arms, brackets, cables, wires, insulators, lamps, lamp sockets, house wiring connections, and electric fixtures of every kind and nature whatsoever.”

The Powers Ditch, which it has just been said, claimed the first right to the natural waters of Little Butte Creek, seems to have been built in the early 70's for hydraulic mining purposes, some water also being supplied to the town of Thompson Flat near Oroville. Hydraulic mining having been stopped, it seems that the ditch was used for some years to supply a colony known as Thermalito Colony. The learned Master, in his report, states that this ditch was used for this latter purpose until 1898. If his statement refers to the full length of the ditch it evidently was an inadvertence, for it is without controversy that the upper portion of the ditch was abandoned and in decay as late as 1890.

The evidence introduced as to the history and user of the "Powers Ditch" from its construction in the early 70's to the year 1890, is very meager and vague. It consisted largely of the recollection of two witnesses,—Milton J. Green (300-302) and A. W. Fogg (310-314). The former at no time ever had any interest in the waters or ditches on Little Butte Creek, and simply testified as to his recollection as a then member of the community. Mr. Fogg, an elderly gentleman, referred to its use only generally. The important thing concerning the ditch is that the proprietors used the natural waters of Little Butte Creek as distinguished from the waters emptied into the creek by the Snow Ditch, a right which, whatever may have been its validity or extent, seems to have been acquiesced in at least by Nickerson.

The record title to the Powers Ditch is set out at pages 304 to 310 of the record, and, summarized, is as follows:

January 31st, 1876, West to Powers and others.

June 23d, 1883, commissioner's deed to Jenkin Morgan.

June 11th, 1887, Morgan to A. F. Jones, 1-8.

July 12th, 1887, Morgan to A. F. Jones, 1-32.

September 15th, 1887, Morgan to A. F. Jones, 1-10.

September 2d, 1890, Morgan to A. F. Jones, 26, 100.

May 20th, 1898, Morgan to A. F. Jones, 147-800.

May 20th, 1898, Morgan to A. F. Jones, 3-10.

October 9th, 1897, A. F. Jones and Thermalito Colony Company to Walter Cutting.

May 25th, 1898, Jones and wife to Oroville Water Company.

August 15th, 1905, Oroville Water Company to Oro, Water, Light & Power Company.

This ditch or water right does not seem to have been included in the conveyance of the Oro Water, Light & Power Company to Oro Electric Corporation, the complainant (Exhibit 9, page 367). The description used in the conveyances was as follows:

“That certain water ditch situate, lying and being in Kimsheew, Oregon and Hamilton Townships, County of Butte, and State of California, formerly known as Walker & Wilson Ditch and now known as the West Ditch, commencing at a dam on Little Butte Creek about one-quarter of a mile below Neal’s sawmill and thence running along and down the banks of said creek; thence over the divide between Little Butte Creek and Dry Creek; thence along and down said Dry Creek; thence over the mountain to Saint Clairs Flat; thence along the foot of Table Mountain to Thompson Flat, together with all flumes, reservoirs, lateral and side ditches, water, office and buildings, and all appurtenances thereto belonging or in any wise appertaining.”

It will be noted from the summary supra that no conveyance appears from Walter Cutting to the Oroville Water Company or to A. F. Jones. At the time that Jones conveyed to the Oroville Water Company in May, 1898, he had already

transferred his interest in the ditch to Cutting, and accordingly, at that time he had no interest which he could convey to the Oroville Water Company. It is to be also noted at this point that the evidence disclosed no record of any appropriation of the waters of Little Butte Creek to be diverted through this ditch, and that there was no evidence of the amount of water diverted and used through the ditch during the period of its user, other than that it took all of the water of the creek in the "low" or "dry" season (D. B. North, 290).

In 1892, George B. Mowry, the predecessor in interest of defendant and appellant, purchased the mining properties now owned by defendant. He immediately started mining operations at the place on the property where present operations are carried on. When he secured the property and went into possession thereof, the upper portion of the Powers Ditch was in ruin and evidently had been abandoned for some time. At that time the record shows that McLaughlin was the owner of the Nickerson and Snow Ditches. Just what use McLaughlin was making of these ditches at that time does not appear from the testimony. Whatever the use, however, it could not have been of much importance or to a great extent, for he permitted Mr. Mowry from the year 1892 to the year 1897, to take what water he need for the operation of his mine out of the ditch. This same arrangement seems to have been continued from 1897 to 1899, while the record title of the Nickerson Ditch

was in Cutting. The learned Master, in his report, states that during this period Mr. Mowry used the water from the Nickerson Ditch only in the winter, the water in summer going to the farmers below. With all due deference to the learned Master, we can find no evidence in the record that shows that Mowry's use of the water was confined to that season of the year. McLaughlin's user, as we have said, does not appear from the record.

In 1899 Mr. Mowry filed a notice of appropriation of 500 miners' inches of water of Little Butte Creek to be diverted at the head-dam of the old Powers Ditch and to be used at his mine (135). He thereupon constructed a new ditch following the lines of the upper portion of the old Powers Ditch, and brought water from Little Butte Creek to his mine. He testified that he made this appropriation at the suggestion of McLaughlin, who called his attention to the fact that the proprietors of the Nickerson Ditch had no right to the natural waters of Little Butte Creek, but only to such waters thereof as had been discharged therein from the Snow Ditch from the west branch of the Feather River (139). The Master suggests that inasmuch as at this time McLaughlin had transferred his rights in the Nickerson and Snow Ditches to Cutting such a statement, even if made, cannot be accepted as evidence of the fact that the then owners of the Nickerson Ditch claimed no right to the natural waters of Little Butte Creek. This, perhaps, is true but it at least shows that during

the time McLaughlin owned the ditch, 1892 to 1897, no such claim was made by him. The witness W. S. Hendrix testified that Mr. Mowry told him that he was going to build his dam to get some winter water and thus save buying water (250), which version the Master is inclined to think is much more consonant with what appears to be the fact. It is possible that both reasons may have actuated Mr. Mowry. He had been securing water from the Nickerson Ditch up to that time as he needed it with the acquiescence of the owners. Cutting, however, had transferred the Nickerson and Snow Ditches to the Oroville Water Company and it was hardly to be anticipated that he would be permitted to take water from the Nickerson Ditch longer without paying compensation for it. Under these circumstances the obvious thing to do, if the natural waters of Little Butte Creek were available, was to appropriate them for use at his mine. There does not appear to have been any controversy at this time between any of the predecessors in interest of the parties and it hardly seems reasonable that Mr. Mowry would have appropriated the water and expended some \$5000.00 (135, 136) in reconstructing the upper portion of the old Powers Ditch if there had been any question about the relative water rights in Little Butte Creek.

Mr. Mowry used the reconstructed Powers Ditch to bring water to his mine until the month of December, 1900, when a slide occurred and put his ditch out of commission. About the same time

the defendant company was organized, and Mr. Mowry's rights in the property and the water were conveyed to it, Mr. Mowry thereafter acting as manager and superintendent of defendant company. The ditch was repaired and between that date and the end of the year 1904 defendant company used water both out of it and out of the Nickerson Ditch (136, 141, 142). During this period the defendant was engaged in ground sluicing and hydraulicking using all the way from 1000 to 1200 inches of water (C. M. Hendrix, 268, 276; W. C. Bader, 336, 337). Defendant's own ditch would not carry more than the 500 inches appropriated, and the nature of the work at the mine required in addition water from the Nickerson Ditch and the greater head there available. Mr. Mowry testified that during this period he arranged with the Oroville Water Company for the use of the Nickerson Ditch to carry the waters from Little Butte Creek, paying therefor a flat rate at first of \$50.00 per month, and afterwards of \$75.00 per month, and also assuming the maintenance and care of the ditch from its head-dam to defendant's property. Complainant contended that the arrangement made was not for the use of the ditch, but was for the purchase of water,—a contention which the learned Master is inclined to believe was the fact. But the question whether he bought the water or rented the ditch is immaterial, since defendant required from the nature of its operations much more than the capacity of its own

ditch or the amount which it had appropriated. Under these circumstances, even if the defendant company bought the additional water needed from the Oroville Water Company, it was no recognition of that company's right to any of the water of Little Butte Creek which had been appropriated by Mr. Mowry in 1899. The last payment made by the defendant company for water from the Nickerson Ditch was in September, 1905, and was made for the use of water in the winter of 1904 (William Durbrow, 298, 299). From the end of 1904 to the summer or fall of 1906 defendant's requirements were satisfied with the water that it brought in its own ditch.

. This was the general situation in the year 1906. The complainant contended that in that year the Oroville Water Company, its predecessor in interest, was not only the owner of the Snow Ditch water which emptied into Little Butte Creek from the west branch of the Feather River, but that it had succeeded to the appropriative rights of the original owners of the Powers Ditch in the natural waters of Little Butte Creek. The extent of this right it did not attempt to define other than to contend that it extended to the full flow of the stream in the "summer time", a statement which at the best, is very indefinite and vague as a measure of appropriative rights. This contention could not be based upon any conveyance of the rights which the original proprietors of the Powers Ditch may have had. No claim could be based upon the deed of

Jones to the Oroville Water Company for the reason that the record shows that at the date of that conveyance Jones no longer had any right, title or interest in the ditch or the water rights, having conveyed them to Cutting. To meet this very obvious defect, complainant seized upon several isolated incidents disclosed incidentally in the testimony, and contended that some arrangement evidently had been made in the year 1890 between Jones and McLaughlin, whereby the water that had originally been taken from the Powers Ditch was diverted down the Nickerson Ditch. This conclusion was sought to be arrived at from the fact that the Powers Ditch seems to have been abandoned in 1890, from the testimony of the witness Bickford that in 1890 McLaughlin had started to reconstruct the Powers head-dam but desisted from so doing when he secured the Nickerson Ditch (378) and from the fact that Jones seemed to have been interested with, or the attorney for McLaughlin. It seems to us that it requires some imagination to deduce from evidence of this character that some arrangement was made between Jones and McLaughlin whereby the natural waters of Little Butte Creek, as distinguished from the water emptied therein from the Snow Ditch, was in 1890 diverted into the Nickerson Ditch. The nature of this arrangement or agreement, if any such can possibly be inferred, is left wholly to conjecture. It is singularly strange that if such an arrangement was made that no record of any kind of its

nature or its terms was produced. It seems hardly reasonable that Jones, if he claimed that the Powers Ditch still had appropriative rights to the natural waters of Little Butte Creek, should have permitted McLaughlin, in whom was the title of the Nickerson Ditch, to divert and use them through that ditch without a scrap of writing to protect his rights. Further than this, in 1890 when the arrangement is alleged to have been made, Jones owned only an undivided one-half, substantially, of the Powers Ditch. Morgan, the owner of the other interest, does not seem to have figured in the assumed arrangement. Again, it is strange if the Powers Ditch water right was added to and merged in the Nickerson Ditch water right, that McLaughlin, when he conveyed the latter ditch to Cutting in 1897 (*supra*), should have made no mention of any right but the Snow Ditch right. On October 4th, 1897, Walter Cutting secured the record title to both the Powers Ditch and the Nickerson Ditch. If the original appropriative rights of the natural water of Little Butte Creek were still vested in the owner of the Powers Ditch, it is singular that when he conveyed to the Oroville Water Company in 1898 he made no mention of them. In the face of such facts as these, it is impossible to infer any such arrangement as was contended for by complainant.

Nor does the fact, if it be a fact, that the Nickerson Ditch took all the water out of Little Butte Creek in the summer time, after 1890, lend any

more probability to such a conclusion.* The word "summertime", which was so frequently used in the questions asked and the responses of the witnesses, is altogether too vague and indefinite as a measure of an appropriative right either in its creation or in its exercise. Apart from this, there is absolutely no evidence that if, as a matter of fact, the Nickerson Ditch did take all the water in Little Butte Creek in the "summer time", it was taken under any claim of right whatever. On the contrary, the action of McLaughlin and Cutting in permitting Mr. Mowry to take such water as he wanted without compensation, is inconsistent with any such claim of right, as is the fact that Mr. Mowry reconstructed the upper portion of the Powers Ditch at a considerable expense in reliance on the fact that the natural waters of Little Butte Creek were open to appropriation. The truth of the matter, we think, is that such a claim was made for the first time by the Oroville Water Company after the year 1905, when the defendant company ceased purchasing water from it and when the greater use for water at Kunkle Reservoir, which was put in effect in 1906, was in contemplation. In the deed from the Oroville Water Company to the Oro Water, Light & Power Company, we find that the Nickerson Ditch for the first time

* Defendant denied that this was a fact. The evidence on this issue, if deemed material, will be found at the following places in the record: Witnesses for complainant, William Durbrow, 188; W. S. Hendrix, 248, 249, 250, 254; C. W. Bader, 237-247; C. M. Hendrix, 266-267; James W. Goodwin, 314; A. A. Davis, 279. Witnesses for defendant, G. B. Mowry, 138, 142, 168, 174; G. B. North, 130; L. Cohn, 161, 163, 164; A. A. McCubbin, 156; A. M. Glover, 339-341; W. C. Bader, 333, 335; S. P. Moody, 125, 126, 127.

in any of the conveyances is described otherwise than as a continuation of the Snow Ditch.

Defendant on the other hand contended that the appropriative right of the proprietors of the Powers Ditch, whatever its origin may have been and whatever its extent, was abandoned as late as 1890, and that it had vested in Mr. Mowry, its predecessor in interest, to the extent of 500 miners' inches by his appropriation in 1899; that neither McLaughlin nor Cutting claimed any right to divert any water out of Little Butte Creek but the water brought in by the Snow Ditch; that in their respective deeds the right conveyed was in express terms limited to such waters; that it appeared from the evidence that the Oroville Water Company, as late as 1901, was engaged in repairing the Snow Ditch (300) and that as late as 1906 water was measured out of the Nickerson Ditch below the head-dam, and returned to the creek in apparent recognition of the rights of others to the natural waters of the creek (E. H. Bickford, 368-382). It further urged that there was no competent evidence whatever to show that the right of the owners of the Powers Ditch to the natural waters of Little Butte Creek was ever transferred to any of the predecessors in interest of the complainant and that, in fact, such water rights were not even referred to in the deed from the Oro Water Light & Power Company to complainant (Exhibit 9, page 367). The defendant, accordingly, claimed that it, as the successor in

interest of Mowry, was in the year 1906 the owner as appropriator of the waters of Little Butte Creek to the extent of 500 miners' inches.

The foregoing is a brief narrative of the salient facts concerning the history of the various ditches up to 1906 and of the respective contentions of the parties with reference to the rights in the natural waters of Little Butte Creek in that year. It is not our purpose to elaborate upon them or to analyze the evidence in further detail. In view of the principle of law which he deemed applicable, the learned Master concluded that a determination of the respective rights of the parties and their predecessors in interest in the waters of Little Butte Creek was wholly immaterial, and expressly declined to find upon that question, suggesting in his report that if the issue was material, the cause would have to be re-referred for further findings (45).

In August, 1905, the Oroville Water Company transferred its properties to the Oro Water, Light & Power Company, including its rights in the Nickerson Ditch and the rights it claimed in the Powers Ditch. The new company planned to collect the waters of the various ditches into the Kunkle Reservoir and use it for the generation of electric power. Accordingly, a survey of new work was made in 1905 and in 1906 the Nickerson Ditch was rehabilitated and reconstructed. Mr. Mowry, the manager and superintendent of defendant company, testified that at this time the Oro Water, Light &

Power Company largely increased the capacity of the ditch through defendant's property, and for the purpose of accommodating the new and greater use, diverted all of the water out of Little Butte Creek and away from defendant's ditch; that as the result thereof, defendant company was wholly deprived of the water flowing in Little Butte Creek and which it had been using through its ditch to operate its mine;* that defendant company thereupon went upon the Nickerson Ditch at a point where it passed over its property, opened the gate which had theretofore been used for taking water out of the Nickerson Ditch while it was being used during the years 1901 to 1904, and took from the ditch water sufficient to operate its mine, not exceeding the amount to which it was entitled under its appropriation, and that it continued to do so from that year until the commencement of this action in 1912.

The learned Master, and the court in overruling the exceptions taken by defendant to the Master's report, held that even were the above facts true, they constituted no defense to the action, and, as on the question as to the respective rights of the parties to water in Little Butte Creek, declined to find on the fact whether the ditch had been enlarged or whether the Oro Water, Light & Power

* The testimony with reference to the enlargement of the Nickerson Ditch and the diversion of water in 1906 will be found at the following portions of the record: Witnesses for defendant, S. P. Moody, 113, 123; A. A. McCubbin, 156-161; W. C. Bader, 338, 339; G. B. Mowry, 137, 138, 143, 166, 167, 170. Witnesses for complainant, William Durbrow, 191-198, 199-201, 209; W. S. Hendrix, 253, 254, 256, 257; C. M. Hendrix, 270, 271; C. W. Bader, 241-247.

Company had diverted water to the use of which defendant was entitled.

The foregoing statement of the general history of the controversy between the parties and of the respective contentions of the parties on the issues, will serve to acquaint the court with the general situation disclosed by the record, and to emphasize what we conceive to be the fundamental error made by the lower court.

Specification of Errors.

The Master's report is quite lengthy (see Trans. pages 21 to 66). To adequately set forth the objections of the defendant to this report it was necessary to take some fifty-six separate exceptions to it. All these exceptions were overruled by the lower court. In order to preserve the points upon which defendant relies it made fifty-five separate assignments of errors (394-411). It is obviously impracticable to attempt a separate discussion of each one of these assignments. Such a course would unduly lengthen this brief and lead to useless repetition. The various assignments of errors can be grouped, however, we think, and discussed under several general specifications.

I.

The court erred in holding as a matter of law and equity that where one possesses an easement

for conducting water across the land of another, which easement is exercised through a designated conduit or ditch, the mere act of the servient owner in taking water out of the conduit is wrongful and a trespass and that it is absolutely immaterial; 1, that the water taken by the servient owner is not water which the other is entitled to carry through the ditch under his easement right; 2, that the water taken by the servient owner is water to the use of which he is entitled as riparian proprietor or appropriator; or 3, that the right of the owner of the easement to the use of the conduit is not exclusive, and that the use by the servient owner is not inconsistent with the enjoyment of the easement.

By adopting and applying this principle the court erred particularly,

A. In holding that complainant made out a *prima facie* case on the pleadings and admissions, and in requiring defendant to go forward with presentation of proof and justify its acts (Assignment XI (398); Exception I (66) to Master's Report).

B. In holding and concluding that the allegations contained in the first three paragraphs of the second affirmative defense pleaded by defendant did not constitute a defense to the action (Assignments V (396) and XV (399); Exception VI (70) to Master's Report). And in this connection:

1. In failing to find upon the respective rights of complainant and defendant to the waters flowing in Little Butte Creek and in the Nickerson Ditch (Assignments XII (398) and XIX (401); Exceptions II (67) and X (75) to Master's Report).

2. In failing to find upon the issue whether the Nickerson Ditch was enlarged in or about the year 1906 through the land of defendant and whether the complainant at said time diverted water from Little Butte Creek to the use of which defendant either as riparian owner or as appropriator, was entitled (Assignments XVII (400) and XVIII (401); Exceptions VIII (75) and IX (75) to Master's Report).

3. In ruling out, rejecting and excluding the offered testimony of the witness, B. L. McCoy, which said offered testimony was in substance as follows: That said witness had made a survey of the Nickerson Ditch in 1905 and 1906 for the predecessors in interest of the complainant company, and that said ditch was enlarged and its capacity largely increased (Assignment XXIX (403); Exception XXXV (96) to Master's Report).

C. In holding and concluding that the allegations contained in the third affirmative defense set out in the answer of defendant

did not constitute a defense to said action (Assignments VI (396) and XVI (399); Exception VII (73) to Master's Report).

D. In failing to define or describe in its judgment and decree the extent and character of the easement right of complainant across the lands of the defendant, which right was by said decree quieted as against the defendant (Assignments XXXV (405) and XXXVI (406); Exception XLV (101) to Master's Report).

II.

The court erred in finding and concluding that defendant's claim to a prescriptive right to use that portion of the Nickerson Ditch extending through its land for the carriage of water, to the use of which it was entitled, or to take water from said ditch, was not sustained by the evidence (Assignments VIII (397) and XXXII (404); Exception XLI (99) to Master's Report).

In particular in finding and determining that defendant had failed to prove the allegations of its sixth affirmative defense, the court erred:

A. In finding that defendant company from 1906 to 1909 used the water from the Nickerson Ditch only occasionally, and not in such a manner as to raise a foundation for prescription (Assignment XXI (401); Exception XXIV (87) to Master's Report).

B. In finding and holding that the water that was taken by defendant in the Nickerson Ditch in the years intervening between 1906 and 1909 was taken without complainant's knowledge and surreptitiously, and that there was no open use by the defendant of the ditch until 1909 (Assignments XXII (402) and XXIII (402); Exceptions XXV (88) and XXVI (90) to Master's Report).

C. In finding and holding that defendant's use of the Nickerson Ditch and of the water through the spillway on its property was several times interrupted by complainant (Assignments XXIV and XXV (402); Exceptions XXX (93), XXXI (94) to Master's Report).

D. In ruling out, excluding and rejecting the offered testimony of the witness, William J. Newman, which testimony was in substance as follows: That the witness had been at the Bader Mine for a week at a time off and on since the year 1903, his visits being made both in the summer and winter; that since the year 1906 the Bader Gold Mining Company had been getting its water out of the Nickerson Ditch; that on these visits in coming and going from Magalia to the mine he quite often passed near the Bader spillway of the Nickerson Ditch, and that on the occasion of every visit made by him he had seen the gateway open and the water running down to the mine

(Assignment XXX (404); Exception XXXVI (96) to Master's Report).

III.

The court erred in holding and concluding that complainant was not guilty of laches, or inequitable conduct (Assignments IX (397), X (398), XXVII (403), XXVIII (403); Exceptions XXXIII (95) and XXXIV (96) to Master's Report).

We will discuss the foregoing points in the order presented.

I.

THE LEGAL PRINCIPLE ADOPTED BY THE COURT AND APPLIED BY IT IN THE CONDUCT AND IN THE FINAL DETERMINATION OF THE CAUSE IS ERRONEOUS.

The act of defendant which complainant charged was wrongful, viz.: the taking of water out of the Nickerson Ditch, was committed by defendant upon its own property. This is not a case of an act done by a total stranger under no claim of right whatever, but it is the act of an owner done upon his own land, and one which under ordinary circumstances would constitute a mere exercise of the dominion accruing to it by reason of its ownership. This basic fact is to be constantly borne in mind in testing the conclusions of the lower court with reference to the law applicable to the controversy.

At the outset one is confronted with the question as to just what claim or right the complainant invoked the aid of court to protect. In its complaint it alleged that it was the owner and in the possession of the "Nickerson Ditch" and it seeks to have its title to this "ditch" quieted; to have it determined that the defendant has no estate, right, title or interest in and to said "ditch" or any right to take water from said "ditch", and to enjoin defendant from asserting any claim to said "ditch".

The word "ditch" ordinarily, and in legal parlance, may mean one of two things: It may mean the right of way for water, or it may mean simply the conduit or physical means through which the water is conducted. Not only is this so, but the right to the water or the right of way for the water is separate and distinct from the right to the physical conduit. The respective rights are capable of separate and distinct injuries giving rise to separate and distinct actions for which there are separate and distinct remedies.

"They are each capable of separate and distinct injuries giving rise to separate and distinct causes of action for which there are separate and distinct remedies."

Kinney on Irrigation and Water Rights,
2nd Ed., Vol. 2, pages 320, 321.

"They (the dam and ditch) are land and for the purposes required must necessarily be connected and continuous, and part and parcel of one entire and complete, fixed and immov-

able thing. When trespassed upon, or taken from the possession of the plaintiff, and withheld as a whole, by one act, we do not see why the act should not constitute one cause of action, as much so as the taking possession and wrongfully withholding of an entire continuous tract of one hundred acres of land. But the water right, when acquired, although intimately related to and connected with the site for a dam and canal, and dam and canal commenced, etc., is a different thing, even though each may be necessary to make the other available or useful. They are capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. The dam and canal may be trespassed upon, broken down, destroyed or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning plaintiff's right to it, and plaintiff may have its action for the trespass, or to recover the possession of the land constituting the dam and canal, or their site; and the water may, also, be diverted and taken away without in any way disturbing or interfering with the dam and canal."

Nev. Co. & Sacramento Canal Co. v. G. W.

Kidd, 37 Cal. 282, at page 309.

While there is an allegation in the bill that defendant injured the banks of the ditch, which suggests a violation of a right to the physical conduit, it is clear from all the allegations of the bill that the word "ditch" is employed in its primary meaning as a right of way or easement for conducting water across the land of another. This is the legal sense in which the word "ditch" is generally employed.

“In plaintiff’s plea of former judgment the allegation is that it had been adjudicated that she was the owner of a ‘ditch and waterway’ across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry water over his lands through a ditch or waterway, and such, we think, is the proper construction of the language quoted.”

Hoyt v. Hart, 149 Cal. 722, 730.

This also is the view taken by the learned Master (35).

Assuming then that the right sought to be protected by complainant is an easement for the conducting of water across the lands of defendant through a certain ditch known as the Nickerson Ditch, in what manner is it contended that the defendant violated this right? It is claimed, solely, that defendant took water out of the Nickerson Ditch, viz.: that it took water out of the conduit through which complainant exercised its right of way for conducting water. The complainant merely contended that it had an easement for conducting water across the lands of the defendant, a claim which as a general proposition was admitted by the defendant. The complainant, however, neither alleged nor attempted to prove the extent of this easement right either in terms of the quantity or in terms of the character of the water it was entitled to conduct across defendant’s land. It neither alleged nor attempted to prove that its right to use the conduit, the Nickerson Ditch,

through which it exercised its easement, was exclusive nor that the water taken by defendant out of the conduit on its own land was water of the complainant or water which it was entitled under its easement right to carry across defendant's land. Complainant stood squarely on the proposition that once it was conceded that it possessed an easement right to conduct water across the lands of defendant, the defendant had no right whatever under any circumstance, short of the consent of the complainant, or of a prescriptive right, to take any water out of the conduit through which complainant exercised its right, and this wholly irrespective of the extent or nature of the right.

Complainant's view of the law was adopted by the learned Master, and by the court, which overruled all exceptions and objections taken by the defendant to the Master's report. Since the soundness of this view goes to the very root of the case it is proper that it should be carefully examined.

Complainant's position and that of the court is based entirely upon one sentence of Judge Temple in the case of *Silver Creek Company v. Hayes*, 113 Cal. 142. That was an action brought to enjoin the defendant from taking water from a certain canal in the possession of the plaintiff and from injuring its banks. The defendant answered and filed a cross-complaint. The allegations of the cross-complaint cannot be ascertained from the opinion. As far as they can be gathered they evidently were to the effect that the defendant was

the owner of land riparian to the creek from which, evidently, the plaintiff was taking water through its ditch. This, however, is only a supposition, because the court does not state the facts. It does not appear whether the defendant was taking water out of the ditch on its own land or elsewhere; whether in fact the ditch extended over the land of the defendant; whether the plaintiff had diverted water to the use of which the defendant was entitled, or what relief was asked for by the cross-complaint. In fact the opinion is so devoid of stated facts that it is impossible to intelligently consider it. In the course of his opinion, however, Judge Temple said:

“But the fact that defendant had a superior right to the water flowing in the creek would not justify him in destroying the ditch or in taking what water he needed from the ditch at points where it passed over or near his land.”

Upon this statement of Judge Temple complainant rests its entire case, contending that where one possesses an easement for conducting water across the lands of another through a designated conduit the mere act of the servient owner in taking water out of the conduit is wrongful and a trespass. Assuming that Judge Temple's statement goes to this extent, it is obvious that the statement cannot be accepted as the deliberate opinion of the Supreme Court of the State of California upon a question fully argued and carefully considered by it. The statement not only was dicta of the most pronounced kind but was made upon a

question of pleading solely, and in a case where, so far as can be ascertained from the reported opinion, it was neither pertinent nor material. It is therefore entitled only to such weight as the doctrine sought to be drawn from it commands as a principle of law or equity.

So far as we are aware there is no such thing known to the law as a general easement right, particularly when the right has its origin in an indefinite grant or is founded on prescription. An easement is a definite, certain, legal right. It must necessarily be so because its enjoyment is a limitation upon the rights of a servient owner in his property, which would otherwise be exercisable to their full extent as of course. For example, one does not speak of a right of way generally over another man's land but a right of way for vehicles, or a right of way to drive cattle, or a right of way to run trains, or a right of way to conduct water, or the like, and a change from one use to another is considered by the law as the exercise of a new right. More particularly a right of way to conduct water, with which we are here concerned, does not mean that one has the right to conduct any quantity of water across the land of a servient owner in any direction or on any portion of the land that he chooses. This is not to say that the servient owner may not by a grant expressly accord such a right to a dominant owner if he so desires, but that such a right can never have its origin in prescription, or even in grant except where the

terms of the grant are so clear as to admit of no other construction.

A right of way to conduct water across the land of another is limited in the first instance to a definite location or way. It is further limited to the particular kind of conduit through which it is exercised.

“The laying of a pipe on a new line or the substitution of pipe for a ditch or a wooden conduit or for a pipe of a smaller size was therefore not authorized by the mere fact that water had already been conducted across the highway in another manner.”

Colegrove v. Hollywood, 151 Cal. 425.

See also

Weil, Water Rights in the Western States,
Third Edition, Section 502, pages 538
et seq.

More than this the easement is not only measured in terms of location and nature and character of conduit, but also, necessarily, in the quantity, or the character (or source) of the water conducted through the conduit. That this is so is shown by the well established rule that a right which arises in prescription cannot extend beyond the actual user made during the prescription period. For example, can one who has been conducting for many years water across the land of another through a ditch of a capacity of one thousand miners' inches,

claim a right of way to the whole capacity of the ditch or to its exclusive use where his maximum user during the period when his right was accruing was one hundred miners' inches? Obviously, to so hold would be according to the dominant owner a right which he had never in fact exercised. This principle is well pointed out in the case of *Smith v. Hampshire*, 4 Cal. App., page 8, where the court said:

“This raises the question whether appellant could acquire a prescriptive right to use and maintain the ditch for the specific purpose of conveying a given quantity of water over respondent's land, while respondents at the same time were using a portion of the same ditch for the purpose of conveying a separate distinct quantity to a given point where the checks and side ditch were maintained. We think that under the authorities in this state this question must be answered in the affirmative. Appellant's ripening prescriptive right was limited to his use, measured by the quantity of his water carried through the ditch, and if there was no hostile interference with that use, a permanent prescriptive right would accrue. This, the court found to be the fact, and as respondents have not appealed, this finding must be taken as importing absolute verity. The measure of appellant's right being thus fixed, respondents retained the right to their land, burdened only by the servitude growing out of appellant's easement acquired by prescription. * * * A ditch is no more than a right of way for the passage of water, and it was not essential that the use of the ditch, either by appellants or respondents, should be exclusive in order to confer the sep-

arate and distinct rights found and awarded by the court."

See also

Section 806, Civil Code (Calif.);

Weil, Water Rights, 3rd Ed., Sec. 581;

Abbott v. Pond, 142 Cal. 393;

Bashore v. Mooney, 4 Cal. App. 476.

The same doctrine applies to an easement arising in grant where the grant is indefinite or general in its terms. In the case of Outhank v. L. S. & M. S. R. R. Co., 71 N. Y. 195, the Court of Appeals of New York held that where a grant had been made in general terms to enter upon the lands of the grantor and lay pipe for the purpose of conducting water across them, without specifying the size of the pipe, the right became fixed by user and that the easement could not thereafter be exercised in any other place, or in any other size pipe. In this connection the court said:

"It is clear then that the right to lay the pipe under plaintiff's grant was fixed by the act of the grantee and the acquiescence of the grantor to the place taken, and it cannot be exercised in any other place across plaintiff's land. But why is not the right also fixed for the same reasons as to the size of the pipe and the quantity of water diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted."

In view of the principles discussed above, an easement for conducting water across the lands of

another may be defined as “a right to conduct water not to exceed a certain quantity or a certain character, in a definite way, and through a specified conduit, across the lands of another”. The location of the way, the conduit through which it is exercised, and the quantity or character of the water to which the right attaches are all elements of the easement. If this be true, how can such right be defined without finding and declaring each constituent element? On what theory can the mere taking by a servient owner of water out of the conduit through which the owner of the easement exercises his right constitute a violation of the easement unless the water taken is water which the dominant owner is entitled to carry across the lands of the servient owner? How can a cause of action be either alleged or proven unless the right alleged to have been violated is defined and measured? We confess to a total inability to see how the mere taking of water by the servient owner out of the conduit through which the other exercises its right can be a wrong or a trespass unless the easement extends to the exclusive use of the conduit, or unless the water taken is water which under the easement right he was entitled to conduct across the land.

A mere analysis of the right of complainant, therefore, demonstrates that the principle adopted by the learned Master and the court is wholly untenable. This conclusion is strengthened by two other considerations which have reference particu-

larly to the rights of the servient owner. In the first place water in an artificial conduit until it is actually severed from the soil is real estate. Whatever may be the view in other jurisdictions, and we understand that in a great many of them it is held to be personal property under such circumstances, the Supreme Court of the State of California has consistently held that it is a part of the land.

Stanislaus Co. v. Backman, 152 Cal. 716;
 Leavitt v. Lassen Irrigation Co., 157 Cal. 802;
 Copeland v. Fairview Land Co., 165 Cal. 148;
 Southern Pacific Co. v. Spring Valley Co.,
 52 Cal. Dec. 273; 159 Pac. 259.

If, therefore, water in a ditch on the servient owner's land is real estate the servient owner as the owner of the fee is *prima facie* entitled to it, and his act cannot become wrongful unless in some manner and in some way the rights incident to his ownership have been limited and vested in others. How it can be shown that an act lawful in itself is in fact unlawful except by proving that the water taken by the servient owner is water which a dominant owner is entitled to conduct across the land of the servient owner, is not apparent. Certainly, this cannot be shown by establishing the existence of an easement for the passage of water in general terms only. It must in addition show the extent and nature of that right.

In the second place, it is a well established principle of law of easements that a servient owner

may use his land, even that portion over which another claims a right of way, in any manner he chooses, so long as his use is not inconsistent with or in interference of the exercise of the easement. Particularly, and what is more to the point in this connection, he may use a conduit for the carriage of his own water, notwithstanding the fact that another exercises an easement for the passage of water through the identical conduit. This principle is applied and very clearly discussed by the Supreme Court of California in the case of *Hoyt v. Hart*, 149 Cal., page 722, which we will refer to in more detail hereafter.

From whatever angle, therefore, the question is approached, whether from the nature of the easement right or from the nature of the rights of the servient owner, it is apparent that the doctrine contended for by the complainant and accepted by the lower court cannot possibly be maintained. It is not, and cannot be the law, in view of the foregoing principles, that the mere taking of water by the servient owner out of a conduit through which an easement for the carriage of water is exercised is in itself either wrongful or a trespass. The act of the servient owner itself is the assertion of a right incidental to the ownership of the soil and necessarily rightful, unless in some way his rights on his own land have been limited. Can it possibly be shown that his right is wrongful by simply asserting generally that complainant has an easement for conducting water through the

conduit? As against one who seeks to limit the exercise of the full rights of his ownership, must the servient owner assume the burden of proving his act is lawful? Must he assume the burden of defining the complainant's right and prove the negative fact that he has not violated it? We consistently and earnestly insisted in the lower court, and we do now earnestly insist, that to take such a view is to violate the most fundamental principles of legal or equitable procedure.

The lower court not only adopted this view in determining the burden of proof, but went a great deal further. It held not only that the burden was upon the defendant to justify its act but that as a matter of substantive law and equity there was absolutely no way that it could in fact justify it, short of showing that its act was done by the consent of plaintiff or that it had secured a prescriptive right to use the ditch on its own property.

A brief reference to some of the rulings of the court will serve at once to emphasize the fallacy of the rule adopted and the hardship and injustice worked on the defendant by its application.

A.

The Court Erred in Ruling That Complainant Had Made Out a Prima Facie Case, And That the Burden Was Upon Defendant to Justify Its Act.

On the first day of the trial before the Master, the parties, for the purpose of facilitating the

trial, made certain admissions. These were to the general effect that the right sought to be protected by the plaintiff was an easement for conducting water across the lands of the defendant, a right which as a general proposition was conceded by the defendant. The defendant insisted, however, that the complainant must show something more than the mere existence of such an easement, that he must prove the nature and extent of that easement, and that the act of defendant in taking water out of the ditch was a violation of that right. There is no occasion to refer in detail to the record as to the exact admissions and stipulations entered into by the parties. We will accept the Master's statement of their purport. In the course of his discussion of this ruling found at pages 28 to 30 of the record, he says:

“I was and am of the opinion that upon the admissions in the pleadings and at the hearing it was shown that plaintiff owned a right of way for water across defendant's land; that defendant had interfered with that right of way by obstructing it and taking water out of it and would continue doing so under a claim of right. This constituted a trespass and threat of continued future trespass making a prima facie case for the plaintiff. It then became incumbent, in my view, upon the defendant to justify the trespass. Defendant's contention that plaintiff must prove the quantity of water covered by his easement will be hereafter more fully discussed.”

If we are correct in our view of the law it is obvious that this ruling of the master was erro-

neous. It was not only erroneous but highly prejudicial to the defendant's case. The Master suggests that even if he were in error in making this ruling that the question of the ultimate burden of proof which remained with the plaintiff was not touched. It is not apparent upon what issue the ultimate burden of proof remained with the plaintiff in view of the fact that the Master held as a matter of substantive law that the complainant was not required to measure or define the right he sought to protect either in terms of the quantity or character of the water which he was entitled to conduct across the defendant's land. Merely to lay a foundation for defendant's second and third affirmative defenses the burden was put upon it to limit and define a right, the measure and extent of which it devolved upon the complainant to prove. It was required to prove the negative fact that it had not violated a right which had not been defined or measured. It is too apparent for argument that the ruling affected a great deal more than the mere order of proof, and that it was not and could not be cured by any liberality in permitting defendant to introduce evidence. Any liberality in this connection may have remedied in some measure the hardship caused to the defendant by being forced, contrary to all reasonable expectations, to go forward with production of evidence, but it could not remedy the fact that thereby the burden was placed upon it of proving a fact, proof of which rested primarily upon the com-

plainant. It necessarily deprived the defendant of the benefit of the well established rule that a plaintiff in an action to quiet title must recover on the strength of his own title and not the weakness of his opponents.

22 Cyc., 1369;

Heney v. Percoli, 109 Cal. 253;

McGrath v. Wallace, 116 Cal. 448.

B.

The Court Erred in Holding That the Allegations of Defendant's Second Affirmative Defense Did Not Constitute a Defense to the Action.

The fundamental principle adopted by the lower court was carried to its fullest extent in the ruling and conclusion that the allegations contained in the second affirmative defense set out in defendant's answer did not constitute a legal defense to the action. As we have heretofore pointed out, it was alleged in this defense in substance that the defendant was entitled to the right to use five hundred miners' inches of water flowing in Little Butte Creek to be diverted at the point commonly known as the old Thompson Flat Ditch which had its intake below the intake of the Nickerson Ditch of complainant; that defendant had been using this lower ditch to take the water it had appropriated to its mine; that in 1906 the plaintiff enlarged its ditch and diverted from Little Butte Creek water to the use of which defendant was entitled by

its appropriation; that thereupon defendant took water out of complainant's ditch at a point on its own land sufficient for its needs, not exceeding the amount to which it was entitled under its appropriation; and that this use of the Nickerson Ditch continued from that time until the time of the commencement of the action.

The discussion of the Master with reference to this defense will be found at pages 34 to 39 of the record. In the course of that discussion he says:

"I know of no authority or no principle of law upon which this claim of recapture can be based. If in 1906 plaintiff diverted water which should have been allowed to flow down Little Butte Creek to defendant's dam, defendant's remedy was either an action for damages or an injunction requiring plaintiff to permit the water to flow in Little Butte Creek to defendant's dam as theretofore. The water itself did not become the subject of property, until restrained by plaintiff's diverting works and ditch. When it passed into plaintiff's ditch it became plaintiff's private property to which defendant had no right without making compensation. It is difficult to see in what way the commission of a tort by plaintiff would justify defendant in committing a tort against plaintiff by trespassing upon its right of way and taking the water it had emptied. There seems no good reason why if plaintiff prevented the water reaching defendant's ditch, defendant gained thereby a right to have the water delivered on his land by the plaintiff's ditch without charge and without any burden of maintenance and operation of the ditch to himself. The case of *Silver Creek v. Hayes*,

above cited, is an authority against defendant's position."

Accordingly, the Master held that the facts set out in the defense were wholly immaterial and therefore declined to find as to the respective rights of the plaintiff and defendant in and to the waters of Little Butte Creek or to the Nickerson Ditch (Assignments XII, XIX), and whether the Nickerson Ditch was enlarged in 1907 as alleged, or whether the plaintiff diverted into its ditch any of the water of Little Butte Creek to which the defendant was entitled (Assignments XVII, XVIII).

In this ruling the lower court carried the principle adopted by it to a somewhat startling, even if logical conclusion. Conceivably, we may be mistaken in the view that as a matter of evidence and procedure the burden was upon the complainant to establish and define his right and the violation thereof by the defendant. Assuming that we are mistaken in this connection, and that the burden of justifying its act was upon the defendant, did not the facts alleged show such a justification? Whatever may have been the extent and character of the easement right claimed by the complainant, whether it was confined as contended by the defendant to the water emptied into Little Butte Creek by the Snow Ditch, or whether it extended to some quantity or portion of the waters of Little Butte Creek, it certainly did not, nor could it, extend to water to the use of which the defendant was entitled either as appropriator or as riparian owner. Ac-

cordingly, since the allegations are only to the effect that defendant took water out of the conduit which had been diverted from its use by the plaintiff, not exceeding the amount that it was entitled to under its appropriation, such act could not possibly violate any right possessed by the complainant. The ruling, therefore, is supportable only on the theory that the mere existence of an easement to conduct water across the lands of another through a designated conduit absolutely precludes the servient owner from taking any water out of that conduit irrespective of the extent of the easement right. This position, as we have heretofore pointed out in detail, cannot be maintained.

If it were assumed, in any possible view of the case, that the doctrine adopted by the court would under any circumstances, be acceptable to a court of law, can it possibly be invoked in a court of equity by a wrongdoer to sanction and perpetuate its wrong? Why should the defendant be required to go to the expense and delay of an action to enjoin the complainant from diverting water to the use of which it is entitled, when its remedy, one that can be availed of forthwith and without any breach of peace, lies immediately at its hand? Even the common law approved of self remedy where that could be availed of without breach of peace or trespass. Among such remedies by the mere act of the party, Blackstone enumerates self-defense, recaption or reprisal, re-entry of land, abatement of

nuisances, and distress for rent. With reference to recaption or reprisal particularly he says:

“Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens when one party hath deprived another of his property in goods or chattels personal, or wrongfully detains one’s wife, child or servant, in which case the owner of the goods, and the husband, parent or master may lawfully claim and retake them wherever he happens to find them so that it be not in a riotous manner or attended with a breach of peace. If therefore he can so contrive it as to regain possession of his property without force the law favors and will justify the proceeding.”

Blackstone, Book 3, page 5.

If this is the view of the common law with reference to goods and chattels, how much more should it be favored by a court of equity under the circumstances disclosed by the allegations of defendant’s answer. Water may not be goods and chattels in a legal or technical sense, but the right to the use of water is as valuable and entitled to as much protection as a right to goods. No good reason appears why equity should not favor a self-remedy with reference to rights to water as much as to other property rights.

With all due respect to the Master and the lower court, we submit that the reasons recited for holding that the act of defendant even under these circumstances is wrongful is neither persuasive nor convincing. It is true, of course, that if complain-

ant diverted out of Little Butte Creek water to the use of which defendant was entitled under its appropriation it had a remedy by action for damages or for an injunction. This circumstance, however, in itself is no reason for precluding defendant from availing itself of a self remedy immediately available, to which on elementary principles of equity it was entitled to resort.

The suggestion that water is not the subject of property until actually taken into possession, and that when it was taken into possession by complainant's ditch it became complainant's private property, is misleading and has no bearing on the fundamental equities involved. It may be true that water flowing in a stream does not become private property until taken into possession, but it does not follow that when it is taken into possession in violation of the rights of others that it thereby becomes private property in the sense that the one entitled to its use is precluded from retaking it where he can do so without trespass or without a breach of peace (see *Stanislaus Co. v. Backman*, 152 Cal. 716). Furthermore, such a conclusion wholly ignores the California doctrine that water until it is absolutely severed from the soil is a part of the realty. When the one who has diverted water to the use of which another is entitled, deliberately conducts and brings that water onto the land of the one whose rights have been violated, it necessarily becomes his property as much as if another had without right erected improvements of buildings on his property.

The suggestions of the Master, therefore, are not pertinent to nor determinative of the question involved.

It was not the contention of the defendant, as intimated in the last sentence but one of the above quotation from the opinion of the Master, that it gained a right to have the water delivered on its land by the complainant's ditch by reason of the fact that complainant had prevented the water reaching defendant's ditch. It contended only that if the complainant actually diverted water to the use of which defendant was entitled and thereafter brought it across its property in a conduit, it was entitled to take it on its land *while* the complainant was actually so diverting the water and *while* the water was crossing defendant's property. The further suggestion that defendant would be thus availing itself of the use of complainant's ditch without charge and without any burden of the maintenance of the ditch to itself has no bearing upon the fundamental principles involved. If in any possible view of the case the complainant after violating the rights of the defendant and while it is actually continuing the wrong can require contribution to the upkeep of the ditch, its rights in this connection can adequately be secured to it by the decree.

We earnestly submit that the ruling of the court on this defense cannot be supported on any legal rule and certainly on no principle of equity.

C.

The Court Erred in Holding and Concluding That the Third Affirmative Defense of the Defendant Was Invalid in Law.

In its third affirmative defense the defendant alleged that it had at no time used the Nickerson Ditch in any manner inconsistent with the enjoyment by complainant of any easement right it may have had to conduct water through it. Defendant contended that if the burden was upon it to justify its act, and if it could not be justified on the broad principles of equity, it could at least be justified on one well established principle pertaining to the law of easements.

It is a principle so well established as to require no citations of authority that a servient owner may use land over which a right of way is exercised in any manner which does not materially impair or unreasonably interfere with the enjoyment of the easement right (14 Cyc. 1208 and cases cited). In considering this defense the learned Master in his report says:

“The third defense in effect is, that defendant is justified in taking water from plaintiff’s ditch provided such use is not ‘inconsistent with the enjoyment of said easement possessed by plaintiff’. Defendant’s position is that plaintiff must prove in definite measure the amount of water which it has an easement to conduct over defendant’s land. Defendant’s position must be that if there is in the ditch any water over and above this amount defendant may take it out without compensation. If such a rule

prevailed ditch owners would be constantly harassed by servient owners taking water from their ditches under claim of right, and putting them upon proof of the quantity which they were entitled to conduct. Since the amount of water passing through a ditch differs as between seasons, and often between hours of the same day, the practical injustice of such a doctrine seems obvious. In fairness to defendant, however, it must be stated that its position in this case does not go thus far. Its position is that where it has the right to divert water from a stream and this right has been destroyed by the action of the upper ditch owner it may use the upper ditch jointly for the passage of its water with the water of the upper owner, on the theory that such owner will get only the water to which he was rightfully entitled."

It may be noted in passing that the Master's suggestion that if the complainant was required to measure his easement right and define the amount of water which it has an easement to conduct over defendant's land, ditch owners would be constantly harassed by servient owners taking water from their ditches under claim of right and putting them upon proof of the quantity which they were entitled to conduct, is of no materiality. The same reasoning is equally applicable to cases of controversy between riparian owners and appropriators, and between appropriators of the waters of a stream, and overlooks the obvious answer that as soon as a right is infringed an action lies to quiet title and admeasure the right and to secure a declaratory injunction. Furthermore, it ignores the fact that the right claimed is a limitation on the right of

ownership of the owner of the fee, and, therefore, if there is any equity in the situation it is in favor of the owner of the fee rather than the ditch owner.

Defendant's position in this defense is primarily based upon the decision of the Supreme Court of the State of California in the case of *Hoyt v. Hart*, 149 Cal. 722. That was an action brought by the plaintiff for an injunction to restrain the defendant from interfering with the flow of waters claimed by the plaintiff in a certain ditch on defendant's land. It appears from the facts recited in the opinion that the plaintiff and defendant were owners of adjoining tracts of land in Siskiyou County, plaintiff's holding lying to the west of defendant's; that on the easterly side of defendant's land there was an irrigation ditch and that each claimed an interest in the waters flowing therein. Plaintiff alleged that it was the owner of two hundred inches of the waters flowing in the ditch and that it had a prescriptive right to have these waters conducted through the ditch over the land of the defendant. The defendant in its answer denied that the plaintiff had any interest in the waters of the ditch other than one-eighth, and that she had never received her measure of the water through any defined channel or water course over the defendant's land. In a cross-complaint the defendant asked that the respective rights in the waters of the ditch be determined and that the plaintiff be required to conduct her waters by a route to be designated by the court outside of de-

fendant's irrigated premises. In her answer to this cross-complaint plaintiff set out a prior judgment by which it was determined that the plaintiff was the owner of a ditch and water way across the lands of the defendant for the purpose of conveying her waters.

The court found that the plaintiff owned an undivided one-eighth interest of the waters flowing in the ditch, which undivided one-eighth at no time exceeded seventy-five inches; that she had conducted it for many years through the ditch over defendant's land in a described course. The decree found that the plaintiff had an easement over the premises of the defendant as described in the findings; declared that the defendant had the right to conduct his waters through the ditch jointly with plaintiff and enjoined the defendant "from in any way or manner interfering with or diminishing the flow of water to which the plaintiff, Elizabeth Hoyt, is at any time entitled to have received as her proportionate share of the waters of said Burgess Ditch", and permitted the defendant to use the ditch jointly with plaintiff provided, however, that he at no time prevent the one-eighth of said Burgess Ditch from flowing through said ditch. The plaintiff appealed from this judgment contending that the decree in authorizing the defendant to use the ditch running over his land in common with the plaintiff deprived the plaintiff of the fixed and definite easement claimed by her. Concerning this claim the Supreme Court said:

“The appellant’s principal objection is directed against the provisions of the decree which declare her right to an easement across defendant’s land. *It is claimed that the decree, in authorizing the defendant to use the ditches running over his land in common with the plaintiff, deprives the plaintiff of the fixed and definite easement claimed by her.* But we fail to see that these provisions of the decree fall short in any degree of securing to the appellant her full rights. It having been found that the water to which she is entitled is only one-eighth of that flowing in the Burgess ditch, and that this one-eighth at no time exceeds seventy-five inches, she is awarded by the decree a right to carry her share of the water over the defendant’s land through the ditches and waterways in which she has claimed a right to carry it. It is true that defendant is also permitted to use these waterways, but his use can never, under the terms of the decree, infringe upon her rights. He is restrained from reducing these ditches so that their carrying capacity will be less than seventy-five inches, or from diminishing the flow of waters to which plaintiff is entitled, and his right to use the ditches is expressly made subject to the proviso that he at no time prevents plaintiff’s one-eighth of the waters of the Burgess ditch from flowing through the connecting ditches. There is no inconsistency between the portion of the decree declaring that plaintiff has an easement in these ditches and that portion which grants to defendant the right to use the ditches jointly with plaintiff for the purpose of carrying his waters. The easement is a right to use the lands of the defendant for conducting her waters to her lands. It can co-exist with a right in the defendant or any one else to use the same waterways, so long as such use does not restrict or interfere with the right owned by

the plaintiff. It would not be claimed that merely because A has a right of way over B's land, B cannot under any circumstances use the portion of his land affected by the easement in a manner which does not infringe upon the exercise of such easement. It is well settled, as a general proposition, that the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement. 'Thus in a case of a way the owner of the servient estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way. He may himself use it as a way * * * unless the rights of the owner of the easement are exclusive' (14 Cyc. 1208, and cases cited). In the case at bar there is no allegation that the plaintiff's right was exclusive."

With reference to the plea of a prior judgment set out by plaintiff in answer to the cross-complaint of the defendant, the court said:

"Plaintiff relied upon this judgment merely for the purpose of establishing her right to an easement for conveying her water across defendant's land. She has been awarded the easement claimed, and would be entitled to no greater rights if the court had expressly found that such easement had been established in her favor by a prior judgment. As we have seen, plaintiff's ownership of an easement over defendant's land is in no degree inconsistent with the use by defendant of the servient tenement, so long as such use is subordinate to the easement and does not restrict or limit its exercise. The former judgment declaring plaintiff's title to such easement did not purport to determine whether or not defendant had a right to use the ditches. It merely determined that

plaintiff had a certain right in them. The right is secured to her by the present decree. A finding that the former judgment was in force would not have entitled her to any greater relief than she received. The absence of such finding cannot therefore affect the judgment now complained of. (*Gould v. Adams*, 108 Cal. 365, 41 Pac. 408; *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1060.) In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a 'ditch and waterway' across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such we think is the proper construction of the language quoted."

A careful reading of this decision, apart from its pertinency to the third defense, demonstrates the soundness of defendant's position on the general principles applicable to this controversy. The Supreme Court of California in this decision most certainly holds that an easement for the conducting of water across the lands of another in a certain conduit is a definite, measurable right. The position of the complainant and of the lower court that the mere existence of an easement right, irrespective of its character or extent, precludes the servient owner from taking any water out of the conduit through which it is exercised, is absolutely inconsistent with the doctrine announced in this case. How, possibly, can a servient owner use a ditch across his land for conducting his own water,

providing it does not interfere with the exercise of the easement right, if by the mere taking of water out of the ditch on his own land he commits a trespass!

In commenting on this decision the learned Master says:

“Judge Sloss in writing the opinion, and the Supreme Court in adopting it, did not contend, and certainly did not mean to be understood as saying if defendant here had no joint right in the easement he could nevertheless use it jointly with plaintiff without bearing any of the expense.”

It is not entirely clear just what is meant by this language. If the servient owner has the right to use the ditch for the purpose of carrying his own water, providing it does not interfere with the easement of the complainant, his mere exercise of that right gives rise to a joint use of the ditch. The only other meaning of which the statement is susceptible is that before a servient owner can use a conduit through which another exercises an easement he must show that some of the water flowing in said ditch belongs to him. It cannot be assumed, however, that this is meant since the Master concludes that the respective rights of the waters in Little Butte Creek and of the waters flowing in the ditch are immaterial. The exact grounds of distinction are not therefore apparent.

The Master, further commenting upon the case with particular reference to the present controversy, says:

“And, furthermore, if the case cited is to be considered as authority for the proposition that defendant may use plaintiff’s land ditch for the passage of defendant’s water, provided room enough is left for the passage of plaintiff’s water, it must necessarily be limited in its operation to that portion of the ditch on defendant’s land. Here, however, the defendant claims the right to run the water which it claims not only through the plaintiff’s ditch in defendant’s land, but through the upper portion of plaintiff’s ditch between the intake and defendant’s land, which runs over land not owned by defendant at all. * * *

“None of the cases cited therefore seem to justify defendant in its claim of right to divert this water through plaintiff’s ditch and to take it out as it passes its land. Nor do they imply the corollary proposition that the owner of a right of way for water must in a suit to prevent trespass upon it prove his right to the water itself, or must measure the extent of his right of way in inches as against a trespasser.”

The defendant did not, and does not claim, that it had the right to itself change the point of diversion from the head dam of its ditch on Little Butte Creek to the intake of the Nickerson Ditch and carry its water through the Nickerson Ditch over the lands not owned by it and on to its own land, under the doctrine of the Hoyt case or upon any other principle. It contended merely that when the complainant diverted the water to the use of which it was entitled flowing in Little Butte Creek into the Nickerson Ditch, and in violation of the rights of defendant conducted the water through its ditch across the lands of others and from thence to

the lands of defendant, defendant was entitled to adopt the act of the complainant as its own act done with the acquiescence and the consent of the complainant, and under these circumstances to justify its act on the doctrine of the Hoyt case. Defendant's position extends no further than that it could take the water out of a ditch on its land *so long and while* the complainant was actually diverting it and taking it across its land. It claimed no right to do so if the complainant ceased diverting the water into the ditch.

We submit that on elementary equitable principles the complainant is in no position to urge that the doctrine of the Hoyt case is inapplicable because the ditch from its intake to the Bader spillway does not extend entirely over the lands of defendant.

D.

The Court Erred in Failing to Find in the Decree the Nature And Extent of Complainant's Right.

As we have heretofore pointed out, the court in its decree found that the complainant was "the owner of that certain ditch situated in the County of Butte, State of California, known as the "Nickerson Ditch"; that defendant had no right, title or interest in or to said "Nickerson Ditch" or any part thereof, nor any right to enter upon said "ditch" nor interfere therewith, nor disturb complainant's possession thereof, nor any right (excepting upon obtaining complainant's permission and paying the

legal rates therefor) to divert or take any of the water which now is, or may hereafter be, in said "ditch", and that a writ of permanent injunction issue against said defendant enjoining and restraining it from in any form or manner, directly or indirectly, asserting any right, title, interest or claim in or to said "ditch", or any part thereof, or from entering upon or in any way interfering with said "ditch" or any part thereof, etc., or from diverting or taking, or causing to be taken or diverted, any of the water which now is, or may hereafter be, in said ditch.

So far as this decree finds that the complainant is the owner of the Nickerson Ditch, and that defendant has no right, title or interest therein, it is perhaps without great prejudice to the defendant. As was pointed out in the Hoyt case, a decree or finding in this language means no more than that complainant owns an easement or right to carry water over defendant's land through a ditch or water way. But the decree goes a great deal further than this. It enjoins the defendant, among other things, from diverting or taking, or causing to be diverted or taken, water out of the ditch, in any circumstances, except upon payment of compensation to the complainant at the usual rates. This is tantamount to a decree that complainant's easement extends to the full capacity of the conduit and that it is entitled to its exclusive use.

It is defendant's contention that if it is wholly mistaken in its view as to the law, and if the second

and third affirmative defense of defendant's answer do not constitute a defense to the action or were not substantiated by the facts adduced in evidence, nevertheless the decree in its present form cannot be sustained.

If the mere exercise of an easement right across the land of the servient owner through a designated conduit precludes the servient owner from taking water out of the ditch under any circumstances, short of the consent of the proprietor of the easement or of a prescriptive right so to do, then a decree finding simply that complainant has an easement right, without fixing or measuring it, would justify the issuing of an injunction preventing the diversion of the water. This proposition, as we have endeavored to point out cannot be maintained.

The only other theory upon which the decree can be supported is that the complainant's easement right extends to the full capacity of the ditch and to its exclusive use. Apart from the fact that it is obvious that the court neither found nor determined this fact, but on the contrary based its decree on the assumed doctrine of the Silver Creek case, there was neither allegation nor proof that complainant's right extended to the full capacity of the ditch or that it was entitled to its exclusive use.

We submit that in an action to quiet title to an easement and to enjoin the act of a servient owner which, it is alleged, interferes and obstructs the enjoyment of the easement right, the decree must fix and determine the right; and that in the absence

of such a finding a judgment shows no possible foundation for an injunction preventing the owner of the land from using the conduit through which the easement is exercised. As the decree stands, the court, without any allegation or proof of the nature or extent of complainant's right, and without finding or decreeing that it extends to the full capacity of the ditch, or its use of the ditch is exclusive, and without so much as determining and describing the ditch by dimensions or course, deprives defendant of any possible use that it might make of the ditch. This, in effect, is depriving defendant of its property without due process and without compensation.

II.

THE COURT ERRED IN HOLDING AND CONCLUDING THAT DEFENDANT DID NOT HAVE A PRESCRIPTIVE RIGHT TO USE THE NICKERSON DITCH AND TAKE WATER THEREFROM.

By its sixth affirmative defense, defendant set forth that it had secured a prescriptive right to use the Nickerson Ditch and to take water therefrom. It was defendant's contention that if the burden was upon it to justify its acts in taking water, and if those acts could not be justified on any other legal or equitable principle, that at any rate it had been in the quiet, open and continuous possession of the right to conduct its water through the ditch and to take water from the ditch, holding and claiming said right adversely to all persons under a claim

of legal right for more than five years before the commencement of the action and accordingly had secured a prescriptive right so to do.

The discussion of this defense is contained in the report of the learned Master at pages 57 to 60 of the transcript. He finds that the user of the defendant of the water out of the Nickerson Ditch was open, continuous and adverse after 1909, but finds and concludes that prior to that date, viz., during the period from 1906 to 1909, (1) the water was taken only occasionally and not in the manner to raise a foundation for prescription and (2) the use was not open, but on the contrary, surreptitious and without the knowledge of complainant. He further finds that (3) in any event the user was several times interrupted by the complainant even subsequent to the year 1909. Each of these findings and conclusions (for they are as much conclusions of law as findings of fact) were excepted to by defendant and have been here assigned as errors (*supra*).

1. We have carefully re-read the record in this case and we submit that there is no substantial conflict of testimony on the fact that commencing with 1906, at which date the defendant contended the complainant diverted the water out of Little Butte Creek, it used the water from the Nickerson Ditch continuously as its needs required. Mr. Mowry, the superintendent and manager of defendant company, testified that he has been using water at the mine continuously since that date and has made no pay-

ments whatever to complainant; that he has used the water in washing for two or three hours every day when working, and when not washing, has used the water to run through the flume, clean out the debris, and keep the sluices tight (137, 138). W. C. Bader, a witness produced by defendant, testified that he worked at the defendant's mine off and on since the year 1901 or 2, up to within four or five months prior to the date of the trial, both summer and winter; that during all the time he was thus working, the defendant secured its water out of the Nickerson Ditch; that while he was working at the mine it was his special duty to turn the water on in the morning from the ditch when he went to work and to turn it off at night (333). The witness E. H. Bickford testified that he worked on the Nickerson Ditch for complainant company in the years 1908 and 1909; that at that time the defendant company took water out of the Nickerson Ditch to the Bader Mine, and that he notified Mr. Durbrow, the superintendent of defendant company, of that fact (368, 381). The witness C. W. Bader, produced by complainant, testified that he had been working at defendant's mine since the year 1900, or thereabouts, and that since the year 1906 water had been used continuously at the Bader Mine out of the Nickerson Ditch (241 to 246).

In addition to the foregoing direct evidence of the user of the water at the Bader Mine from the years 1906 to 1909 defendant put in evidence its pay-rolls, pay-checks, etc. (Exhibit 342-350), which

showed that the Bader Mine had been operated practically continuously from February, 1906, to December, 1912, employing all the way from three to eight men. It is without controversy that after 1906 defendant's ditch, heading in Little Butte Creek, fell into decay, and that the only source from which water could be procured for the operation of the mine was from the Nickerson Ditch. This fact, in connection with the fact that the mine was a placer mine and could not be operated without water, is a silent, though eloquent, corroboration of the testimony of the witnesses.

The Master evidently reaches his conclusion that the user was not continuous solely on the testimony of the witness Durbrow, the substance of which he recites in his report. His testimony was to the effect that he was the manager of the Oroville Water Company, and of its successor, between 1903 and 1908; that if any water was used by defendant between 1906 and 1908, it was without his knowledge; that if it was taken during the summer when all the water was needed for irrigation he would have learned of its diversion either from the ditch tender or from the complaint of irrigators. He did not testify that he personally was on the ditch frequently and he admitted that if the water had been taken other than in the limited irrigation season, it possibly would not have been called to his attention. We submit that this conclusion of the witness, for it is nothing more than a conclusion and an inference, cannot, in view of

the direct evidence to the contrary, raise a substantial conflict as to the user of the defendant company of water from the Nickerson Ditch during the years after 1906.

In this connection it may be pointed out that even if the user was occasional it does not follow that it was not continuous in a legal sense. If the water was used by defendant company whenever it needed it, though that may not have been frequently, the use in legal contemplation was continuous. (Wiel, *Water Rights in the Western States*, 3rd edition, Sec. 583, and cases cited.) The Master did not find that the water was not used on all occasions when required by defendant company.

2. The finding that the user during this period was also surreptitious and without the knowledge of complainant, has as little support in the evidence. The spillway of defendant in the Nickerson Ditch is an extensive structure, as are the flumes and pipes leading therefrom. If, therefore, the defendant used the water continuously from 1906 to 1908, as its needs required, it is obvious that it could not have been surreptitious. How the defendant company could have conducted its mining operations during those three years, working, as the pay-rolls show, four or five men at the mine, by the surreptitious use of water, is not apparent. If the water was used from its spillway as defendant required it, the water running from morning to evening (*supra*), this fact alone proved knowledge on the part of complainant. This is entirely apart from the tes-

timony of Bickford, the ditch superintendent, that he knew of the user and reported it to Durbrow (*Guernsey v. Antelope*, 6 Cal. App. 392; *Defrize v. Quint*, 94 Cal. 635; *Silver v. Hawn*, 10 Cal. App. 544; *Montecito v. Santa Barbara*, 144 Cal. 597).

The learned Master arrives at his conclusion that the use during these years was surreptitious in part because of the testimony of the witness Durbrow, to which we have just referred, and in part because of an incident testified to by the witnesses Biek and Lincoln. As we have pointed out, the testimony of Durbrow is a pure conclusion, and of no particular weight in this connection. The witnesses Biek and Lincoln testified that in April, 1909, they went over the ditch with Bickford, who was at that time terminating his employment with the company, and was showing Biek over the plant as his successor. It appears that when they reached the spillway of defendant they found the gate open and one Ed Bishop in charge. Biek testified that Bickford talked with Bishop and that Bishop closed the gate down. This witness stated his version of the incident in this way:

“At the time we were there on April 19th, 1909, Mr. Bishop closed the gate down. Mr. Bickford and he talked about it and he just closed it down. I don't think anybody asked him. I do not know whether he stayed there and raised and lowered the gate. He said that he was told to turn it on for fifteen or twenty minutes at a time and then close it down. We went on down the ditch and did not return any more. We saw him leave the place going

down to the mine. Neither Mr. Bickford, myself nor Mr. Lincoln went to the Bader Mine at that time, nor did we see Mr. Mowry or any officer of the Bader Mining Company. Mr. Bickford did all the talking. I don't know that he told him to leave the gate down. He asked him if he did not know he was doing wrong by doing that. He really gave no orders at all that I can remember of. He told us that Mr. Mowry instructed him to open the gate for fifteen or twenty minues, and then close it down for half an hour before he opened it again, so that the water people would not miss the water" (222).

The witness Lincoln, referring to the same incident, also stated that Mr. Bickford had done the talking with Mr. Bishop. He testified:

"I don't remember anything that was said except that Mr. Bickford asked him how long he had kept the gate open and he said he had orders to keep it open fifteen or twenty minutes and then shut it down for at least half an hour. That is all I remember about being said. He closed the gate there before we left" (228).

At another place in his testimony he said:

"At the time I was on the ditch in April or May, 1909, the time when Mr. Ed Bishop was there, Mr. Bishop did not state to me nor in my hearing the reason why he was manipulating the gate" (234).

Mr. Bickford, in his testimony, does not refer to the incident.

Mr. Mowry testified that he had, as a matter of fact, on that occasion, instructed Bishop to open

and shut the gate at the spillway so as to leave it open for twenty or thirty minutes and then shut it down again. He testified that these instructions were occasioned by the fact that there were some sixty feet of debris in the mine and that they were driving a new tunnel; and that the water was needed to sluice out the debris and rock after the blasting. In order that the men could have a chance to break up the rocks to get ready for the sluicing he instructed Bishop to close the gate for about twenty minutes at a time and then open it again, and turn the water all down, and that they kept that up all day (353).

It will be noted that the Master reaches his conclusion that this incident is proof that the Bader mine was taking the water surreptitiously on the testimony of Biek that Bishop said that Mowry had given these instructions "so that the water people would not miss it". Lincoln, who was also a witness for complainant, and present at the time, testified that Bishop did not state any reason for his instructions. In view of the fact that there is not one scrap of evidence in the record other than this one incident upon which any finding that there had been a surreptitious use of the water could possibly be based, it is submitted that this testimony does not justify the finding that on that occasion the defendant company was taking the water clandestinely. It certainly is not evidence of a habit or custom of doing so.

In this connection, we desire to call the court's attention to the Master's ruling excluding and rejecting the testimony of the witness William J. Newman (386). He testified that from the year 1903 he had made many visits to the Bader Mine, both summer and winter; that since 1906 the mine had been getting its water out of the Nickerson Ditch. He then was asked whether on the occasions on which he was there, the gate from the Nickerson Ditch was open and the water running down to the mine. An objection to this question was sustained by the Master, and defendant was precluded from showing by the witness that on the occasion of every visit he made he had seen the gate open and the water running to the mine. In view of the fact that the Master finds both that the use during the years from 1906 to 1909 was not continuous and was surreptitious, it is obvious that this ruling was prejudicial.

3. The Master further finds, however, that even if the use after 1906 was continuous and open, it was, nevertheless, interrupted several times by complainant and its predecessors in interest. The acts which the Master construes as interruptions of the user by defendant are not enumerated in his report, and it is therefore impossible to determine whether his conclusion is one of law or of fact.

The record shows that on no occasion when the Bader spillway was found open by the company's representatives and was closed by them, was the fact that the gate had been closed by complainant

brought home to the knowledge of defendant. Not the least remarkable circumstance in this case is the careful manner in which the officers and employees of the complainant and its predecessor in interest refrained from going to the mine after they had closed the gates and calling the attention of defendant to the fact that complainant had closed it (Biek, 223, 224; H. H. Lincoln, 234; A. A. Davis, 286).

Unless these acts were brought to the knowledge of defendant as acts of complainant, they obviously did not constitute an interruption of the user in any legal sense (*Bratin v. Conn*, 91 Pac. 458).

Mere notices posted on the spillway by complainant forbidding the taking of the water, or verbal protests, could not in any view of the case constitute sufficient interruption as to prevent the accruing of the prescriptive right (*Coxe v. Clough*, 70 Cal. 345; *Oregon v. Allen*, 69 Pac. 455).

It is worthy of note with reference to this question of interruption, that the employees of plaintiff, according to their own testimony, never attempted until 1912, when the five year period had run, to take out the cross-gate in the Nickerson Ditch (or the appliance by which the water could be diverted (277, 278, 288, 334)), or to block up or at any time to take out the spillway or interfere with defendant's flume leading from the ditch.

We submit that a careful reading of the record shows without question that from the year 1906 the defendant company openly, continuously and

adversely, under a claim of right and with the full knowledge of the complainant, took water out of the Nickerson Ditch at a point on its land as it needed it, and that by reason of these facts alone, apart from any other question in the case, its acts were justified under a claim of prescriptive right.

III.

THE COURT ERRED IN HOLDING THAT THE COMPLAINANT WAS NOT GUILTY OF LACHES OR OF INEQUITABLE CONDUCT.

The defendant contends that irrespective of every other question involved in this case the complainant was not entitled to the equitable relief prayed for in that it had slept on its rights and was in an inequitable position.

It is a well established principle that irrespective of any Statute of Limitations, laches, in seeking a remedy in equity, may prevent the plaintiff from securing the relief prayed for (*Wiel, Water Rights in the Western States*, Vol. 1, Sec. 644).

“A party seeking equitable relief against the interference with an easement must be prompt in doing so. Any long delay not satisfactorily explained or accounted for will bar his right to such relief.”

14 Cyc. 1219, and cases cited.

This is particularly true where, by reason of facts accruing by reason of the long delay of complainant to enforce his remedy, equitable relief cannot be afforded without doing an injustice.

The Master states that there has been no change in the position of the parties in that the defendant was in the same position after 1906 as it was before, inasmuch as prior to that time no water was used out of its ditch from Little Butte Creek in the summer time. As we have heretofore pointed out, the defendant pleaded and contended that in 1906 the complainant had diverted all the water out of Little Butte Creek away from its ditch, and that its ditch had by reason thereof fallen into decay and ruin. If it be true that complainant diverted the water of defendant in that year, that thereafter defendant took the water while it was actually being conducted across its land and has continued to do so ever since it would seem, if there is any force whatever in equitable principles, that the complainant, after permitting it to do so for such a length of time, thereby losing any right that it may have had to enjoin the diversion of the water, has been guilty of laches and has no standing in a court of equity. And this is true even if the user by defendant of water out of the Nickerson Ditch, because of interruptions, or otherwise, was not of a character to raise a prescriptive right. For this reason, if for no other, the failure to find on the water rights in Little Butte Creek or on the question of diversion was erroneous and prejudicial.

CONCLUSION.

One cannot read the record in this case carefully without being impressed with the circumstance that

the complainant at no time until the elapse of five years after the time when defendant claimed it diverted defendant's water from Little Butte Creek, made any effort apart from a few verbal protests, and an occasional shutting of defendant's spillway, to prevent defendant from taking water out of the Nickerson Ditch. We think it is a fair inference that the complainant deliberately permitted the five year period to elapse after its diversion of defendant's water, at the expiration of which time it took out defendant's spillway and commenced this action. In so doing it was its purpose, if possible, to prevent defendant from taking further water on the assumed precedent of the Silver Creek case, and at the same time raise the bar of the Statute of Limitations to any attempt on the part of defendant to prevent further diversion of its water from Little Butte Creek. This purpose will be accomplished if the decree is permitted to stand.

We submit that the decree is erroneous and should be reversed.

Dated, San Francisco,
May 16, 1917.

Respectfully submitted,

R. H. CROSS,
ARTHUR H. BRANDT,
Attorneys for Appellant.

No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY
(a corporation),

Appellant,

vs.

ORO ELECTRIC CORPORATION
(a corporation),

Appellee.

Filed

JUN 29 1917

F. D. Monckton,
Clerk.

REPLY BRIEF FOR APPELLANT.

R. H. CROSS,
ARTHUR H. BRANDT,
Solicitors for Appellant.

Filed this.....day of June, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

We are fully aware of the rule, referred to by counsel, that the findings of the Master on questions of fact are presumably correct, and where based upon conflicting evidence or the credibility of witnesses are not subject to review. It was because of this rule that in its opening brief appellant stated as facts only those matters which were without controversy. On all other matters reference was made to the findings of the Master or to the respective contentions of the parties. The rule invoked, of course, has no application to matters upon which no finding was made or to

findings which are merely inferences from conceded facts.

The "re-statement" of facts made by appellee (pages 2 to 9 of brief for appellee), does not call for extended comment. The most of the matters therein contained were discussed in our opening brief. There are one or two statements, however, that require brief mention at this point.

Counsel state that the Nickerson Ditch was constructed "long prior to the date of the acquisition by defendant of the title to its property and the issuance of the patent therefor". It is entirely true that the ditch was constructed prior to the time that defendant took title to the property, but we think that counsel is mistaken in the statement that it was constructed prior TO THE ISSUANCE OF THE PATENT FOR THE LAND. The finding of the Master referred to certainly is not to this effect. He states that

"both the Nickerson and the Powers Ditch proceeded across the land of the defendant long prior to the date when the defendant took title thereto".

This, of course, is not a statement that the ditches were constructed prior to the issuance of the patent for the land. A careful examination of the record fails to disclose any evidence whatsoever as to the time when the patent for the property, at this time owned by the defendant, was issued by the Government, and appellee's statement finds no support in the record. It is important to note this

because the argument of appellee on the legal questions involved is based almost entirely upon this assumption.

Counsel call attention to the fact that the Master found that after 1890 when the Powers Ditch went out of repair the Nickerson Ditch took all of the water in the summer flowing in Little Butte Creek at the Nickerson Dam. This statement is cited as justifying the conclusion that the predecessors of appellee had secured title to the waters of Little Butte Creek by adverse use. This is suggested at page 5 of appellee's brief and also at pages 30 and 31 thereof.

We had occasion in our opening brief to refer to this finding of the Master (pages 22 and 23). He expressly disclaimed any intention of finding on the water rights in Little Butte Creek. Thus at page 39 of the record he states:

"So far as the second defense is concerned, therefore, there is no issue here as to the defendant's right in the waters of Little Butte Creek, nor any issue as to the enlargement of the ditch, nor any proper foundation for claim for damages."

Again at page 45 of the record he states:

"I do not, for example, in this report, intend to find either as to plaintiff's title to the water in the Nickerson Ditch or as to the defendant's title by reason of the appropriation in 1899. If I am wrong in my conclusion as to the necessary presence of these issues the case will have to be referred again for findings."

At no place in his report did he find anything other than the bare fact that after 1890 the Nickerson Ditch took all the water in the summer flowing in Little Butte Creek. He did not designate the period or months of the year covered by the word "summer", nor did he find that the water so taken was taken under claim of right or adversely. At no place in his report did he indicate or suggest that the predecessors in interest of complainant had secured any right to the water in Little Butte Creek by prescription or otherwise. In view of these facts, and of his express disclaimer of making any finding upon the question of the water rights in the creek, his statement is not entitled to the weight which counsel would give it. On the contrary, it appears to us that if the Master had believed from the evidence that complainant's predecessors in interest had secured a prescriptive right to the waters in Little Butte Creek he would have found that fact and based his decision upon it rather than upon the proposition that as a matter of law the second affirmative defense was not well taken.

At page 5 of their brief counsel suggest that we were mistaken in our statement that the Powers Ditch was not included in the conveyance of the Oro Light & Power Company to Oro Electric Corporation. The suggestion is made that the conveyance included the "Walker and Wilson" or "West Ditch" and that these are the names by which the Powers Ditch was formerly known.

There is no occasion for any controversy about this statement since the deed from Oro Water, Light & Power Company to Oro Electric Corporation is in evidence (Plaintiff's Exhibit No. 9, Trans. p. 367). Neither the "Walker and Wilson" or "West Ditch" nor the "Powers Ditch" is named in the deed nor is the Powers Ditch comprehended by any terms used in the description.

It is also suggested, with reference to the absence of a conveyance of the Powers Ditch from Walter Cutting to Oro Water Company, that no such conveyance was necessary. This is based on the theory that Cutting's conveyance of the Nickerson Ditch to the Oro Water Company carried with it, as appurtenant to said ditch, all his rights in the waters of Little Butte Creek, which were formerly appurtenant to the Powers Ditch. This, of course, is based wholly on the assumption that the proprietors of the Nickerson Ditch had secured title to the waters of Little Butte Creek by adverse possession, an assumption which, as we have pointed out *supra*, is wholly unwarranted. Apart from this, any such conclusion is negatived by the very terms of Cutting's deed. He conveyed

"That certain ditch and water right taken from the *west branch of the Feather River* at a point nearly opposite the village of Inskip * * * known as the Snow Ditch; also all additions to said ditch made by said parties of the first part (A. A. Nickerson, or his grantors) to convey the waters thereof to or near Paradise * * *".

It will be noted that the only water right referred to by Cutting is a water right taken *from the west branch of the Feather River*, and that no mention whatever is made of any water right in Little Butte Creek.

The other matters contained in counsels' statement of facts are sufficiently covered by the discussion in our opening brief, and we pass to the consideration of the points urged by appellee in support of the Master's view of the law applicable. Counsel follow the arrangement adopted in our opening brief, and for the sake of clarity, we will adhere to the same arrangement in this reply.

I-A.

In answer to our contention that the Master erred in ruling that complainant had made out a prima facie case and that the burden was upon the defendant to justify its act, counsel are content to quote the Master's reasons for such ruling and his comments thereon. Inasmuch as we have already discussed this statement of the Master (pages 47 and 48 of the opening brief), further discussion is unnecessary.

I-B.

Counsel discuss the ruling of the Master on defendant's second affirmative defense under four

headings. These will be answered in the order presented.

(1) It is contended in the first place that even had the defendant established its right to the use of the water of Little Butte Creek this fact would not have justified its entry upon complainant's ditch under the circumstances alleged in the second affirmative defense (brief for appellee, pp. 13 to 38).

The argument on this point is based almost entirely upon the assumption that the Nickerson Ditch was constructed prior to the issuance of a patent for the land now owned by the defendant. As we pointed out *supra*, there is no basis for any such assumption in the record. Apart from this, it is to be noted that the Master in discussing this defense did not base his ruling on any such assumed fact nor did he find it as a fact. Counsels' discussion in this connection is, therefore, beside the point.

We may add in this connection that even were it true that the Nickerson Ditch was constructed prior to the time of the issuance of the patent to the land now owned by defendants, counsels' conclusion would by no means follow. The only purpose of Congress in passing the Acts of 1866 and 1870 (see Revised Statutes, Sections 2339 and 2340) was to preserve to the appropriators of water on the public domain such rights as under the customs of the minors, with the acquiescence of

the Government, had become vested prior to the time that patents were issued for the lands. Congress was not concerned with the exact nature and character of the right which had been secured, leaving that to be governed by local law and custom. When property across which a ditch had been constructed passed into private ownership by reason of the issuance of a patent, the rights of the patentee and the ditch owner were left to be governed by general principles of law. There is nothing, of course, in the legislation of Congress that justifies the conclusion that it was its intention to exclude the patentee from the use of a ditch across its property where it could use it without any interference or obstruction of the use theretofore made by the ditch owner. This was a question with which Congress was not concerned, and one which, of course, did not enter into the reasons for the legislation. Counsel have cited no cases and we know of none which lend any support to their proposition.

Counsel point out that a right to a ditch is an entirely different thing from the right to the water flowing in the ditch, and that these two rights are capable of separate and distinct injuries giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. This is the position that appellant has consistently and earnestly insisted on all through the trial and hearing of this cause, and is the same position taken by us in our opening brief. The

confusion in the case arises from the fact that complaint in its bill failed to distinguish between these two meanings comprehended by the word "ditch".

We do not for a moment question complainant's right to prevent the defendant from physically injuring the ditch, from breaking down its banks, from filling it up, or from doing other acts which would render it useless for the purpose of conducting water. Were complainant's action in this case solely for the prevention of such acts as these, and were the injunction confined to the commission of such acts, defendant would have no cause for complaint. But the primary purpose of complainant's action *was to prevent defendant from taking water out of the ditch*, even though it was taken without physically disturbing the ditch. In other words, while the right sought to be protected was simply described as a "ditch", it is obvious that of the two distinct rights comprehended within the meaning of that term the one it sought to protect *was an easement for the flowage of water across the land of defendant* and not its right to the mere physical conduit as such. This was admitted by appellee at the time of the hearing, was assumed as the situation by the Master, and was the theory upon which the entire case was heard and determined. Thus the Master states (Trans. p. 35):

"The plaintiff, it will be noted, does not allege that it owns the water which flowed into that ditch. The question of ownership of water came into the case by reason of defendant's

theory as to the law governing such matters, and in the course of the proceeding accordingly plaintiff replied with a large amount of evidence bearing on the question of its ownership of the water. The word "ditch" in ordinary parlance may mean two things: one, a right of way for water; two, the physical means by which this right is exercised. *N. C. & S. C. Co. v. Kidd*, 37 Cal. 282. The second is the restricted sense, referring to the instrument by which the right of way is made effective, and secondarily, is a more restricted sense distinguishing the open conduit from the dam and other works. While the allegation of injury to the bands made in the bill of complaint herein suggests the second meaning, it is otherwise sufficiently clear as by the allegation as to defendant's taking water from the ditch, that the right alleged by plaintiff and admitted to belong to him, refers to the first meaning of the word 'ditch'; *that is, a right of way or easement for conducting water across land.*"

We are to consider this case, therefore, as if instead of the words actually employed in the bill, the appellee had alleged that it "was the owner and in the possession of an easement to flow water across the land of the defendant in a certain ditch known as the Nickerson Ditch", and that "defendant obstructed and interfered with said easement by taking water out of said ditch". This fact is not to be lost sight of in seeking a solution of the question presented by defendant's second affirmative defense.

Even a casual examination of the cases cited by appellee shows that counsel wholly disregard the

very distinction they themselves make, and in support of a ruling made entirely with reference to one meaning of the term "ditch" cite rules and principles bearing solely on its other meaning. Notwithstanding the fact that appellee concedes that the right it is seeking to protect is an easement for the flowage of water, the primary sense in which the term "ditch" is used, it argues on the basis that the right involved is that to the physical conduit. It seems hardly necessary to say that such a process of reasoning throws no light whatever on the immediate question at issue.

It is not our intention to review in detail the cases cited. *In no one of these cases was any question of easement involved, nor was any question of the relative rights of a ditch owner and the owner of a servient tenement presented.* On the contrary, the right involved in every case cited was the right to the physical conduit. For example, in the case of *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. 379, the sole question involved was whether water flowing in a ditch was a waterway within the meaning of the rule that ejectment does not lie for a waterway. The court held that a ditch was distinguishable from a natural waterway and was something more than a mere incorporeal hereditament and of such a nature that ejectment could be maintained for its possession. With this proposition, and it is the same proposition laid down by the other cases cited, we entirely agree. There can be no question, either on principle or on authority,

but that a ditch may be considered as connected and continuous and part and parcel of one entire and complete, fixed and immovable thing, and as such entitled to protection against trespass by one having no possible right or interest therein. This fact, however, has no pertinency whatever in the determination of the mutual rights of a ditch owner and the owner of private property across which the ditch extends where the right involved is not that of an entire physical property in the sense just noted but an easement for the flowage of water across the land in private ownership. Appellee's position in the ultimate analysis must rest solely upon the dicta in the Silver Creek case.

It is suggested that the right of complainant in the present instance is comparable with the right obtained by a railroad company for its right of way. Since it has been held that the right of way for a railroad company is exclusive, it is argued that the right of way here involved must also be considered exclusive. We do not think that counsel urge this proposition with any seriousness. In the first place, the decisions are not at all uniform even on the proposition that the railroad right of way is exclusive (33 Cyc., 189). Apart from this, there is no comparison between a ditch right and a railroad right of way in any possible view of the case. The cases which lay down the rule that the right of way of a railroad is exclusive is based on the fact that the right of way is a public highway. A ditch, of course, or the right

of way for water, is not of such character. So far as we know, the rule instanced by counsel has never been applied to any right of way other than that of a railroad. The case of Hoyt v. Hart, 149 Cal. 722, referred to in our opening brief, is, of course, a direct answer to this contention.

As we have heretofore pointed out, the Master, considering the facts to be immaterial, did not find upon the allegations of the second affirmative defense. Counsel for appellee, however, at pages 24 to 28 of appellee's brief, discuss the question whether the Nickerson Ditch was in fact enlarged in 1906 and the water diverted, the suggestion being that even if valid in point of law the second affirmative defense was not established as a matter of fact. Since appellee has entered into a discussion of this question, it is proper to point out that the allegations of the defense in this connection were proven by the overwhelming weight of the testimony.

Counsel, of course, call the court's attention only to those portions of the record which bear out their contention. They have entirely omitted the major portion of the evidence bearing on this question.

There is no controversy in the case but that in the fall of 1905 and in the spring of 1906 the Oro Water Company, the predecessor in interest of complainant, did extensive work on the entire length of the Nickerson Ditch. At that time the

company was preparing to take the water to the Kunkle Reservoir. The Company had some forty or fifty Chinese laboring on the ditch under the direction of one Murphy as foreman. The only controversy was as to the exact character of the work done at that time. The complainant contended that the ditch was merely "cleaned out". The point to be determined was not, however, just what term to apply to the work but just what effect the work had on the capacity of the ditch. The evidence shows without a question that the capacity of the ditch was increased at least six or seven hundred inches.

Defendant produced a number of witnesses who testified directly to the fact that the ditch was enlarged and its capacity increased. Thus Mr. Mowry testified directly to this fact and to the diversion of the water which resulted thereby (Trans. pp. 137, 138, 143 and 170). This was corroborated by the testimony of S. P. Moody (Trans. p. 123), by A. A. McCubbin (Trans. pp. 156 and 161), and by W. C. Bader (Trans. pp. 338 and 339). All of these witnesses testified that they had actually seen the work being done and there could be no possible question but that the ditch was enlarged and its capacity increased.

Complainant's own witnesses testified to the same effect. Thus C. M. Hendricks stated that undoubtedly the ditch at the north end of the Bader Mine, from his observation, had been enlarged (270, 271). C. W. Bader called by the complainant testified not

only to this effect, but to the direct fact that the water had been diverted thereby from the Little Butte Creek from the head dam of the Powers Ditch. The testimony of this witness is particularly interesting. His memory as to dates was very poor, but he was clear on the fact that the predecessors in interest of complainant had actually enlarged the ditch in 1906 and diverted all the water from the creek. Thus at page 245 of the record he testified as follows:

“Q. But when ordinarily mining you used only the Powers Ditch, did you not?

A. There was quite a while we used the Powers Ditch when drifting.

Q. And did not use the Nickerson Ditch?

A. Did not use it for awhile.

Q. That was for a number of years?

A. Until they took all the water out of Little Butte Creek; that dried up the flumes and they went out.

Q. Both summer and winter time you used the Powers Ditch?

A. Yes.

Q. In reference to the time that Murphy had the gang of Chinamen on there, do you know whether or not it was about that time that they took all of the water out of Little Butte Creek and turned it down the next ditch?

A. After they worked on the ditch?

Q. After Murphy worked on the ditch?

A. Yes.

Q. After that you could not get any water out of the Thompson Flat Ditch?

A. Could not get any water in the lower ditch.

Q. The water quit running in that after Murphy with his Chinamen had worked on the ditch?

A. Yes, he turned it all down the ditch.”

In addition to the direct testimony as to the enlargement of the ditch and the diversion of the water, given both by witnesses for complainant and defendant, the physical facts demonstrate conclusively that such was the fact. G. B. North, a disinterested witness, testified that he supervised the ditch when originally built in 1888 and that it was built to carry 1000 inches of water with safety when first built and 1300 after it had settled down and had been used for a few years (Trans. p. 133). H. D. Graddon, an engineer employed by complainant company testified that he made measurements of the ditch in the month of May, 1913, and that at the time he measured the ditch there was actually flowing therein 1425 inches. He did not pretend to testify that the ditch would not carry any more than that amount, but that, in his opinion, it could not safely do so. W. L. Huber, a civil engineer, testified that from the profile and field notes taken by Mr. Graddon of the Nickerson Ditch it would safely carry forty second-feet when the ditch was filled to within four and a half inches below the top of the berm (Trans. p. 325). Further, and this one item absolutely disposes of complainant's contention, this figure of forty second-feet, or 2000 miner's inches, is the complainant's own estimate of the capacity of the ditch. On October 13, 1913, subsequent to the time Graddon made his survey, complainant, through its engineer, forwarded to the United States Forest Service a statement of its plant which included a statement of the capacity

of the Nickerson Ditch. From that it appeared that it estimated the capacity of the ditch at 40.1 second-feet (Trans. p. 320). Since the original capacity of the ditch did not exceed 1300 inches, it is too apparent for argument that the "cleaning" given the ditch in 1906 increased its capacity some 700 inches.

William Durbrow, the manager and chief witness for complainant, conceded that the 5-foot flumes which were originally on the ditch were changed to 6-foot flumes (Trans. p. 208). Increasing the size of the flume is wholly inconsistent with any theory that the ditch at that time was merely being "cleaned out" to its former capacity.

Appellee finds it necessary to urge that since no new dam was built at the time the work was done in 1906 there could have been no diversion of water. The suggestion is that the dam regulated the flow of the water in the ditch. This obviously is a mistake. Mr. North testified (Trans. p. 133) that the amount of the water in the ditch was regulated by the headgate of the ditch. He stated

"These gates were always kept closed down so as to let just so much water under them and the rest flowed over the dam. If you were taking all the water into the ditch you would raise these gates up."

Clearly, the flow into the ditch was not regulated by the height of the dam but by the manipulation of the intake gates.

While we are on this subject it may not be amiss to direct the court's attention to the ruling of the Master excluding the testimony of the witness, B. L. McCoy, which ruling was excepted to and specified as erroneous (page 29, opening brief). While the trial was in progress appellant located this witness, a civil engineer, and the man who actually surveyed the Nickerson Ditch for the work done in 1905 and 1906. He still had his field notes made at that time. In view of the fact that there has been a great deal of controversy during the trial concerning the character of the work done, appellant called him to the stand to have it determined finally, and once and for all, exactly what was done. Much to our surprise, counsel for appellee strenuously objected to the questions asked him. These objections were sustained (Trans. pp. 382 and 383). If the Master had actually found that there had been no diversion of the water and no enlargement of the ditch in 1906, this ruling alone would justify a reversal. Apart from this consideration, the action of counsel for complainant in objecting to the testimony is an interesting commentary on their present contention.

(2) In our opening brief we suggested that the act of the defendant in taking the water out of the Nickerson Ditch after the water had been diverted, was justifiable as a self-remedy which could be availed of without breach of peace, and accordingly should be favored by a court of equity.

In answer to this suggestion counsel point out that no title or ownership to water of a stream is secured before it is actually taken in possession or reaches the point of diversion, and accordingly, that the principle of recaption to which we referred is not applicable (pages 28 and 29 of appellee's brief). We did not, of course, contend that the right to the use of water was a chattel or that the rule cited was directly applicable. Our only purpose was to show the approval given by the common law to a self-remedy where it is available, and to suggest that it should meet the same approval in a court of equity. While the title of water is not secured until actually in the possession, the right of riparian proprietor or appropriator to the waters of a stream is itself an important right and one, of course, which the law protects.

(3) Counsel admit that the Master declined to find upon the issue as to the water rights of Little Butte Creek, but they suggest that the Master found facts from which the legal conclusion that complainant's rights in the waters were superior to those of the defendant inevitably follows (pages 29 to 32, brief for appellee).

This suggestion is based almost entirely upon the statement of the Master that after 1890 when the Powers Ditch went out of repair the Nickerson Ditch took all the water in the summer flowing in Little Butte Creek at the Nickerson Dam. We have had occasion to refer to this state-

ment in our opening brief and also in this reply brief (*supra*, p. 3).

The general question as to the ownership of the waters of Little Butte Creek in 1906 is discussed at length in our opening brief, pages 7 to 27 inclusive, and there is no occasion to repeat here what was there said. We think that it is too plain for argument that the complainant not only failed to establish any right in and to the waters of Little Butte Creek, except to the water therein in excess of the amount which had been appropriated by Mr. Mowry, but that defendant by his appropriation secured a paramount and prior right.

One word may be added at this point concerning this general claim of complainant that the evidence establishes a prior right in its favor to the water of the creek. The right, if it secured any, must be based upon adverse use. As counsel themselves well stated, proof to establish title by adverse possession must be clear and satisfactory and the burden is upon the adverse claimant.

Mr. Weil describes the essentials for the acquisition of the right by adverse use or prescription as follows:

“The following are the requisities for the loss and acquisition of a right by adverse use or prescription, viz.: The use must be continuous for the statutory period, exclusive (i. e. uninterrupted; i. e. peaceable), open (i. e. notorious), under claim of right (i. e., color of title), hostile, and an invasion of the other's

right which he has a chance to prevent, and taxes must be paid.”

Water Rights in Western States, Vol. 1, Sec. 582.

It will be noted by a reference to the report of the Master that he does not find either the taking of the water from Little Butte Creek after 1890 was exclusive or under a claim or right, or hostile, or an invasion of a right which the defendant's predecessors had a chance to prevent. Counsel do not point to any evidence which proves, or even tends to prove, that the use by its predecessors in interest was of the character essential to give rise to a prescriptive title. On the contrary, to mention just two elements necessary for a prescriptive title, the evidence shows conclusively that the use was neither adverse nor under a claim of right.

From the year 1892 to the year 1899, when he filed his notice of appropriation, Mr. Mowry took all the water which he found necessary to use at the mine from the Nickerson Ditch. This water was taken with the knowledge, acquiescence and consent of McLoughlin and of Cutting, who were the owners during these years of the ditch. How possibly can it be contended that McLaughlin's and Cutting's taking of water from Little Butte Creek, if in fact the water was so taken, was adverse when Mowry's right to the water as a riparian proprietor was recognized to the extent of permitting him, without compensation, to take such water as he needed from

the ditch? These facts show conclusively that there was no adverse user during this period.

Furthermore, there was absolutely no claim of right or color of title whatever on the part of McLoughlin or Cutting to any of the waters flowing in Little Butte Creek, except the waters conducted therein by the Snow Ditch. Apart from Mr. Mowry's testimony that McLoughlin himself suggested and advised him to appropriate the natural waters of Little Butte Creek, this fact is shown by the descriptions in the deed from McLoughlin to Cutting (Trans. p. 360) and in the deed from Cutting to Oroville Water Company (Trans. p. 362). In both these deeds the water right referred to is that "water right taken *from the west branch of the Feather River* at a point nearly opposite the Village of Inskip". This action of McLoughlin and Cutting in expressly describing the water rights appurtenant to the Snow and Nickerson Ditch as taken from the west branch of the Feather River, is conclusive evidence that they claimed no title to the natural waters of Little Butte Creek. Counsel's suggestion, therefore, that unquestionably the user of the water was adverse to the world, including the defendant, is wholly without support in the evidence.

We have already answered at length the suggestion that complainant has a record title both to the Powers Ditch and water right and to the Nickerson Ditch and water right (see pages 20 et seq. opening brief).

In concluding the discussion of this point we would suggest that complainant well knew when it commenced this action that if its rights depended upon its ability to show prior right to the waters of Little Butte Creek, its chances of prevailing in the action were not of the best. Complainant's action in omitting from its bill any allegation whatever concerning its right to the water and its insistence that water rights were not involved, are explainable only on the theory that it knew that it would be exceedingly difficult to establish that fact. It preferred to base its action upon the dicta in the Silver Creek case, and thereby avoid, if possible, the necessity of going into such a question.

(4) It is suggested in the fourth place that

“since the water in question was devoted to public use the defendant could not retake or recapture it, but that its remedy, if any, was an action for damages” (page 32, brief for appellee).

This is a rather remarkable proposition, and one which, of course, finds no support whatever in the cases cited.

The rule to which counsel adverts, but which they do not discuss, is well stated by the Supreme Court of California in the case of *Barton v. Riverside*, 155 Cal. 513, cited by appellee, as follows:

“This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the pub-

lic use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions and avail themselves of the conveniences and advantages thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use or to recover possession of the property so taken, but will be relegated to an action for damages.”

In view of the fact that the second affirmative defense alleges that upon the diversion of the water defendant *immediately* retook it from the Nickerson Ditch on its property, it is obvious that no element of estoppel is present here, and that the rule referred to by counsel has no application whatever.

I-C.

Appellant contended in its opening brief that if its action in taking water from the Nickerson Ditch was not justified on broad principles of equity under the facts alleged in the second affirmative defense, it could at least be justified under the doctrine of the case of Hoyt v. Hart, 149 Cal. 722.

Counsel in answer to this suggestion contend that the case of Hoyt v. Hart holds only that it is legally possible for two parties to both hold, and have the right to the use of, a ditch, and suggest that the servient owner is not entitled to use the ditch *except where he has received a conveyance of the right to do so from the ditch owner or has secured a prescriptive right to do so* (pages 32 to 34, brief

for appellee). Needless to say, this proposition entirely ignores the doctrine expressly laid down in that case. No amount of argument or discussion can disguise the fact that it was there held directly and expressly that the general rule that a servient owner can use a right of way in any manner which does not materially impair or interfere with the enjoyment of the easement, is directly applicable to a ditch, and that a servient owner is entitled to use the conduit for the carriage and flowage of his own water so long as such use does not restrict or interfere with the right owned by the complainant.

II.

Appellant contended in its opening brief that if the burden was upon it to justify its acts, and if these acts could not be justified on any legal or equitable principle, at any rate it had been in the quiet, open, continuous and adverse possession of the right to conduct its water through the ditch for more than five years before the commencement of the action, and accordingly had secured a prescriptive right so to do. Exception was taken to the action of the Master in the finding against this prescriptive right, and it was pointed out that the findings that the water was taken only occasionally after 1906, that the use was not open, but on the contrary, surreptitious and that it was interrupted, were without support in the evidence.

Counsel in discussing this question (page 36, brief for appellee) do not dispute our contention that there is no substantial conflict of testimony on the fact that commencing with 1906 defendant used the water from the Nickerson Ditch continuously as its need required. Accordingly, we are justified in assuming that they do not question the correctness of this conclusion.

In support of the finding that the water was taken surreptitiously, they rely solely upon the testimony of Durbrow, Beik and Lincoln. The testimony of these witnesses was referred to by us at length in our opening brief, and we submit, as we there contended, that they afford no justification whatever for a finding that defendant took the water either surreptitiously, or without the knowledge of complainant.

A reference to the testimony referred to by appellee on the question of interruption shows, as stated in our opening brief, that the sole acts which could in any possible view of the case be considered as an interruption was the occasional closing of the Bader spillway and the occasional posting of a notice on defendant's gate. Counsel do not dispute the proposition that such acts are not interruptions in a legal sense unless they were brought home to the knowledge of defendant as the acts of complainant, nor do they question our statement that these acts were not as a matter of fact brought to the attention of the defendant. Concerning the suggestion that Mr. Mowry himself admitted such

interruptions, it will suffice to say that the portion of the record referred to only shows that he knew that the gate at times was shut down. He did not state, however, and there is no evidence that he knew who had closed the gate.

We submit, therefore, that the Master was not justified on the evidence in finding that the use by defendant of the Nickerson Ditch after 1906 was either occasional, or surreptitious, or interrupted.

(2) The second point of counsel on this question of prescriptive user is directed to the fact that all the taxes have been paid by complainant and its predecessors, and that no taxes have been paid by defendant. Though it is not so stated, we presume the point is that even had defendant taken the water continuously, openly and without interruption, it could not have secured a prescriptive title because of its failure to pay the taxes (page 37, brief for appellee).

It is a rule, of course, in California that the payment of taxes is an essential element in acquiring a prescriptive title. This rule, however, has no application to the acquisition of a prescriptive title to a portion of an easement. The adverse use by a servient owner of an easement possessed by another is not the acquirement of a right on the part of the servient owner, but a limitation of the right claimed by the dominant owner, and the payment of the taxes assessed on his land by the servient owner

fulfills the requirement (Smith v. Hampshire, 4 Cal. App. 8, 11).

(3) Counsel suggest in the third place that "A very insignificant part of the water taken by defendant has been put to beneficial use" (page 37, brief for appellee). They refer to no testimony showing the total amount of water taken by defendant and the proportion of that amount actually placed in use, nor is any evidence referred to which shows or tends to show that any part of the water taken by defendant was wasted. Extended discussion of this question, however, is unnecessary because appellee itself admits that defendant had beneficial use for at least forty or fifty inches of water. If it were the fact that it had no use for a greater amount, this does not, of course, justify the finding that it had not secured a prescriptive right to any amount.

(4) The final point made by appellee is that since both the ditch and water were dedicated to public use no prescriptive right could be acquired in either so long as such use was continued. This proposition is stated but not discussed (page 37, brief for appellee).

It is true that it has been held that a prescriptive right cannot be obtained to a right of way of a railroad company. This is based on the theory that a railroad right of way is a public highway (see Southern Pacific Co. v. Hyatt, 132 Cal. 240, cited

by appellee). We know of no case, and none has been cited, extending this doctrine to any other public service corporation. The rule is not based upon the fact that the railroad right of way is dedicated to public use but solely on the fact, as just indicated, that it is in its nature a public highway.

Counsel throughout their brief constantly refer to the farmers at Paradise. Indeed, it is asserted that the controversy here is one between the "complainant and the farmers at Paradise" and the defendant. The purpose of this statement is, of course, to make it appear that defendant is not justified in insisting upon its rights and that in doing so it ignores the public interest.

If the complainant had been as solicitous of the rights of the farmers in 1906 as they are at this time, it would have been a simple matter to have resorted to its right of condemnation and taken over the rights of defendant in Little Butte Creek and paid therefor a proper compensation. It cannot now justify its wrong by any reference to the public interest or the public rights. In this connection some observations of Mr. Justice Sloss in the case of *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, are in point:

"Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private

property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."

We submit that the theory adopted by the trial court in the conduct of this case was an erroneous one, and that as a result of its application defendant has been greatly prejudiced.

Dated, San Francisco,

June 18, 1917.

Respectfully submitted,

R. H. CROSS,

ARTHUR H. BRANDT,

Solicitors for Appellant.

No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY

(a corporation),

Appellant,

vs.

ORO ELECTRIC CORPORATION

(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Filed

MAY 31 1917

Filed this.....day of May, 1917.

F. D. Monckton.

Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

INDEX.

	Page
STATEMENT OF FACTS	2
ARGUMENT	9
I. The legal principles adopted by the court and applied by it in the conduct of the trial, and in the final determination of the case were not erroneous	9
(A) The court did not err in ruling that complainant had made out a prima facie case and that the burden was upon it to justify its case	10
(B) The court did not err in holding that the allegation of defendant's "second affirmative defense" did not constitute a defense to the suit	12
(1) Even had the defendant established that its right to the use of the water of Little Butte Creek was superior to that of the complainant, this would not have justified its entry upon plaintiff's ditch..	13
(2) Until water is actually diverted by the owner into his ditch or upon his land he obtains no ownership thereof or title thereto. The defendant therefore was not the owner of any water flowing in complainant's ditch, and for that reason no basis for the existence of the claimed right of "recapture"	28
(3) Defendant's theory of "recapture" fails also because the rights of complainant to the use of the waters of Little Butte Creek are established, by the overwhelming weight of the testimony, to be prior to those of defendant.....	29

	Page
(4) Since the water in question was devoted to public use, defendant could not retake or "recapture" it, but its remedy, if any, was an action for damages	32
(C) The court did not err in holding that the "third affirmative defense" of defendant was invalid in law	32
(D) The court did not err in failing (as contended by appellant) to find in the decree the nature and extent of complainant's rights	34
II. The court did not err in holding that defendant did not have a prescriptive right to the Nickerson Ditch or to take water therefrom, except upon paying the lawful rates therefor.....	34
1. Defendant's use was not open, continuous, peaceable or adverse.....	35
2. The taxes have all been paid by plaintiff and its predecessors, and no taxes have been paid by defendant	37
3. A very insignificant part of the water taken by defendant has been put to beneficial use.	37
4. Both the ditch and the water were dedicated to public use and therefore no prescriptive right could be acquired in either so long as such use continued	37
III. The court did not err in holding that complainant was not guilty of laches or inequitable conduct..	34

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(a corporation),

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ORO ELECTRIC CORPORATION

(a corporation),

Appellee.

BRIEF FOR APPELLEE.

This suit was brought in the United States District Court for the Northern District of California by Oro Electric Corporation against Bader Gold Mining Company to obtain a decree quieting complainant's title to a certain ditch in Butte County, California, used by it in its business of supplying water to the public for irrigation and in generating hydro-electricity, and to obtain an injunction restraining the defendant from interfering with said ditch or taking water therefrom.

The case was heard by the Standing Master in Chancery of the United States District Court for

the Northern District of California, under an order of said court (made upon a stipulation of the parties), authorizing him "to take and report the testimony, together with his findings and conclusions thereon" (Tr. p. 18). In the report of the Master, it is said:

"What the defendant calls a narrative of facts was intended by the Master to be the findings of fact in issue which the order of reference requires me to report, and to obviate any doubt upon the matter I find the facts as stated in the foregoing report" (Tr. p. 64).

All of the disputed questions of fact involved, were found in favor of the complainant. These findings, therefore, as we understand the rule, cannot now be made the subject of successful attack.

Last Chance Mining Co. v. Bunker Hill etc. Co., (C. C. A. 9th Cir.) 131 Fed. 579, 587;
Davis v. Schwartz, 155 U. S. 631; 15 Sup. Ct. 237, 239; 39 L. Ed. 289.

In the statement of facts set forth in appellant's brief, the above rule is wholly disregarded. It becomes necessary, therefore, to restate here the facts as they were found by the Master, and established by the overwhelming weight of the evidence.

Statement of Facts.

The Nickerson Ditch was constructed by A. A. Nickerson in the fall of 1888 and the spring of 1889, long prior to the date of the acquisition by

defendant of the title to its property and the issuance of the patent therefor (Findings, Tr. p. 46). Mr. North, who constructed it, and who testified as a witness on behalf of defendant, stated that as constructed its depth below the "thorough-cut", or graded surface, was three feet, its width on the bottom was three feet, and its width on the top was five feet (Tr. p. 128). The grade, he also testified, was 9.60 feet to the mile (Tr. p. 133). A ditch of these dimensions would have a capacity of 1740 miner's inches (Tr. p. 193). Mr. North further testified that as originally constructed the ditch extended from its intake in Little Butte Creek to the Magalia and Chico Road below the property now owned by defendant (Tr. p. 128).

For many years prior to the construction of said ditch, a ditch known variously as the Powers Ditch, the West Ditch, the Walker and West Ditch, and the Thompson Flat Ditch—and which will be hereinafter referred to as the "Powers Ditch"—having its intake in Little Butte Creek at a point about a mile below the present intake of the Nickerson Ditch, had taken water from said creek and carried it in a southerly direction to the vicinity of Oroville, where it was used for hydraulic mining and other purposes (Findings, Tr. p. 48). At about the time the Nickerson Ditch was constructed, however,—the finding is "about the year 1890" (Findings, Tr. p. 90)—the upper portion of the Powers Ditch fell out of repair and was abandoned, and from that day to this, the Nickerson Ditch

(except at periods of high water), has carried all of the water of Little Butte Creek. "It is absolutely clear on the evidence, despite much contradictory evidence," said the Master in his report, "that after 1890, when the Powers Ditch went out of repair, the Nickerson Ditch took all of the water in summer flowing in Little Butte Creek at the Nickerson Dam" (Tr. p. 50). The Master further found "that all taxes since 1888 assessed against the Nickerson Ditch have been paid by the plaintiff or its predecessors and that no taxes on said ditch have been paid by the defendant" (Tr. p. 60).

It may be also mentioned here that while the upper portion of the Powers Ditch was thus early abandoned, this was not the case with the lower portion of it. On the contrary, the record shows that shortly after the Nickerson Ditch was constructed, it was connected with the lower portion of the Powers Ditch, and thereafter a part of the water carried through the Nickerson Ditch was transferred over to the lower part of the Powers Ditch, and thus carried on to a point near Oroville, as in the days before the construction of the Nickerson Ditch (Findings, Tr. p. 49; Tr. p. 251).

Nickerson's title to the ditch and the water right appurtenant thereto passed by mesne conveyances through various hands until, on April 30th, 1898, it became vested in Oroville Water Company, which, on August 15th, 1905, conveyed said property to Oro Water Light and Power Company, which in turn transferred it to complainant by deed dated

March 12th, 1912 (Findings, Tr. p. 47). For many years, the ditch has been used by complainant and its predecessors during the irrigating season in supplying water for irrigation to a prosperous agricultural community in Butte County below defendant's land, known as Paradise Valley. In the winter, the water is stored in one of complainant's reservoirs termed the Kunkle Reservoir, whence it is conveyed to the hydro-electric plants of complainant which supply the City of Oroville and its inhabitants with electricity. All of the water flowing in Little Butte Creek (except in extreme high water periods, when the amount of water in the creek exceeds the capacity of the ditch) is required for these purposes, and in summer there is scarcely enough water to supply the irrigators at Paradise.

Complainant's right both to the ditch and to the water of Little Butte Creek is shown not only by this long period of adverse user—over a quarter of a century—with payment of all taxes, but it is also the owner *of record* of both the Powers Ditch and water right and of the Nickerson Ditch and water right. It will be unnecessary here to trace the deraignment of title to said ditches and water rights, but reference may be made to the findings of the Master at pages 46 and 47 of the record, and to pages 304 to 310 and 357 to 368, where such deraignment appears.

In this connection, it may be noted that on page 15 of the brief for appellant, it is stated that the Powers Ditch “does not seem to have been included

in the conveyance of the Oro Water Light and Power Company to Oro Electric Corporation". Counsel, however, are mistaken in this, since the description in said conveyance included the Walker and Wilson or West Ditch, which, as above stated, are the names by which the Powers Ditch was formerly known (Findings, p. 46).

It may also be mentioned that while, as pointed out in the brief for appellant (p. 15), no conveyance of the Powers Ditch appears from Walter Cutting to Oroville Water Company, none was necessary, since for many years prior to the conveyance made by Cutting to Oroville Water Company, in April, 1898, covering the Nickerson Ditch and the water rights appurtenant thereto (Tr. p. 362), all of the water of Little Butte Creek had been carried down the Nickerson Ditch,—the upper portion of the Powers Ditch having been abandoned much earlier, as just stated. When, therefore, Cutting conveyed the Nickerson Ditch and water right to the Oroville Water Company, such conveyance carried with it as appurtenant to said ditch, all his rights in the waters of Little Butte Creek which were formerly appurtenant to the Powers Ditch.

Lower etc. Ditch Co. v. Kings River etc. Co.,
60 Cal. 408;

Williams v. Harter, 121 Cal. 47, 51.

It may also be mentioned here that the Snow Ditch referred to in the brief for appellant (p. 9), fell out of repair and ceased to be used at about the same date that the Powers Ditch fell out of repair

(1890) (Findings, Tr. p. 50). It thus appears—as already stated—that from the year 1890 to the time of the commencement of the action, all of the water flowing in Little Butte Creek (excepting only that flowing therein at extreme high water) was carried down the Nickerson Ditch and sold by complainant, or its predecessors, for irrigating, or used by it in generating electricity which was sold to the public.

The defendant's rights are claimed to have been initiated by the posting by George B. Mowry, on March 17, 1899, of a notice of appropriation on Little Butte Creek below the head dam of the Nickerson Ditch at the point where the intake of the old Powers Ditch had formerly been located. The amount of water so appropriated, as stated in the notice, was 500 inches measured under a four-inch pressure (Tr. p. 135). It clearly appears, however, that at that date there was no such amount of water flowing in Little Butte Creek below the head dam of the Nickerson Ditch, the only water which flowed there being such as was made up from springs and from seepage through said head dam. The evidence further shows that when this appropriation was made, Mowry fully realized that the entire flow of the creek had for many years been carried down the Nickerson Ditch and that he stated at the time he posted the notice of appropriation that his purpose in so doing was to obtain some "winter water" and thus save buying water (Findings, Tr. p. 52). Mowry thereafter rehabilitated to a certain extent the upper portion of said ditch, and

used, for a short time, such water as he could obtain therein, when he was obliged to discontinue such use by reason of the upper portion of the ditch falling into disrepair. No conveyance to defendant of any rights which Mowry may have obtained by this appropriation appears in the record (Findings, p. 53).

For a time thereafter the Mining Company purchased water from the owners of the Nickerson Ditch, paying them a flat rate of fifty dollars per month therefor, which was later raised to seventy-five dollars per month (Findings, Tr. p. 54). At a subsequent date, the Mining Company (as the Master found, Tr. p. 58) commenced surreptitiously to take water from the ditch. The evidence in this regard showed that its employees were instructed to open a spillway in the Nickerson Ditch not far from defendant's mine, and to permit water to flow from the ditch to the mine for periods of about fifteen or twenty minutes at a time, the object being in this way to prevent complainant's ditch tender, who was engaged in the performance of his duties near Paradise, from detecting the loss of the water. The record further shows that whenever complainant's officers and employees discovered that the spillway was open, they closed the same; that notices were posted at the spillway prohibiting further interference with the ditch, and that numerous other attempts were made by it to stop interference with the supply of water. Finally, in the summer of 1912, when the irrigators at Paradise were urgently

in need of water for their crops, defendant openly shut off the supply of water in the ditch by opening the spillway, causing all of the water in the ditch to be conveyed to the mine—with the result, as testified to by some of the witnesses at the trial, that tons of fruit and berries at Paradise were lost. The evidence further shows that by far the greater portion of the water thus taken by defendant was wasted. Complaints having been made by the farmers at Paradise both to complainant and to the Railroad Commission, this suit was commenced.

Argument.

In the following pages, each of the propositions discussed in appellee's brief will be considered in the order in which they are therein stated.

I.

THE LEGAL PRINCIPLES ADOPTED BY THE COURT AND APPLIED BY IT IN THE CONDUCT OF THE TRIAL, AND IN THE FINAL DETERMINATION OF THE CASE, WERE NOT ERRONEOUS.

On pages 32 to 67 of appellee's brief will be found discussed four legal propositions in respect of which it is claimed that the court below erred. It will be convenient to postpone detailed consideration of the opening pages of appellee's argument in this connection (pp. 42 to 45) until the consideration of the particular proposition in question which is

claimed to have been erroneously determined in the court below is considered. We pass, therefore, to the first of these propositions.

A

The court did not err in ruling that complainant had made out a prima facie case, and that the burden was upon it to justify its acts.

It will be seen from an examination of the record (pp. 108-110) that at the opening of the hearing the following facts stood admitted by the pleadings or the stipulations of counsel, viz.: the incorporation and citizenship of the parties, that the plaintiff was engaged in the business of selling to the public, water for irrigation, and other beneficial purposes, and electricity for light, heat and power; that complainant was the owner of the Nickerson Ditch; that the defendant asserted some claim to a portion of said ditch and claimed the right to enter upon and take water from it without making compensation to complainant; and that at divers times during the months of April, May, June, July, August, September and October, 1912, it had repeatedly and without right, and against the command of complainant entered upon and taken water therefrom. It also appeared that the matter in dispute exclusive of interest and costs, exceeded the sum of three thousand dollars, and that the defendant threatened to continue to assert said claims and to enter upon and interfere with said ditch, and to take water therefrom against the consent of complainant and without making compensation therefor, and that it

would continue so to do unless restrained by injunction, etc.

In short, substantially all of the allegations of the bill were admitted either by the answer or by the stipulation of the parties at the hearing. It therefore clearly devolved upon defendant to justify, if it could, the acts complained of. For this purpose, the defendant pleaded six affirmative defenses. It was, therefore, incumbent upon it to establish these defenses, or one of them, by evidence, and it was not necessary that plaintiff should proceed to disprove them until defendant had introduced evidence in their support.

J. M. Robinson and Norton Co. v. Tuscaloosa
(C. C. A. 5th Cir.), 53 Fed. 966, 970;
Lilienthals Tobacco v. United States, 97 U. S.
266.

We, therefore, respectfully submit, that no error was committed by the Master in denying defendant's motion to dismiss (Tr. p. 110). If, however, we are mistaken in stating that it was necessary for defendant to justify its acts, it is abundantly clear that the ruling complained of was entirely without prejudice to the defendant, as will be seen from the following excerpt from the Master's report (p. 29):

"While I see no error in the ruling requiring the defendant to go forward with the evidence, it must be pointed out that the ruling did not touch the question of the ultimate burden of proof, which, of course remained with the plaintiff. Furthermore, if there was any error

in the ruling, it simply affected the order of proof, which was in the discretion of the Master; and if any harm was thereby done to defendant's presentation it was remedied by the Master's liberality in allowing defendant to offer full proofs in later stages of the hearing."

We pass, therefore, to the second proposition which it is claimed was erroneously decided by the court below.

B

The court did not err in holding that the allegation of defendant's "second affirmative defense" did not constitute a defense to the suit.

The argument of appellee upon this point will be found at pages 48 to 54 of its brief, where the theory is advanced that defendant was entitled to forcibly enter upon and "recapture" "its" water flowing in the Nickerson Ditch. Our answer to this proposition will be made under the following headings:

(1) Even had defendant established that its right to the use of the water of Little Butte Creek was superior to that of the complainant, this would not have justified its entry upon plaintiff's ditch.

(2) The "recapture defense" fails, also, since the water flowing in plaintiff's ditch did not belong to defendant. This follows from each of the following propositions:

(a) Defendant could acquire no title to the water while it was flowing in the stream, or until it was diverted into its ditch.

(b) Complainant's rights in Little Butte Creek were superior to those of defendants.

(3) Since the water claimed to have been "recaptured" was dedicated to public use, the defendant's remedy, if any, was an action for damages.

These propositions will be considered in the order stated.

1. Even had the defendant established that its right to the use of the water of Little Butte Creek was superior to that of the complainant, this would not have justified its entry upon plaintiff's ditch.

It will be borne in mind that the rights of defendant in the land owned by it were acquired long subsequent to the construction of the Nickerson Ditch (Findings, Tr. p. 46). Under the established rule, therefore, defendant's title was taken subject to the right of way for the existing ditch, the latter, under the legislation of Congress, being regarded as a vested right at the date of the issuance of the patent.

Jennison v. Kirk, 98 U. S. 453;

Jacob v. Day, 111 Cal. 571;

Jacobs v. Lorenz, 98 Cal. 332.

The case is precisely the same, therefore, as if the owner of the land through which the ditch passed had granted to plaintiff's predecessor a right of way therefor. If such grant had been made, no one, we suppose, would attempt to claim a right in the

grantor to thereafter flow any water in the ditch or exercise any other act of ownership in reference thereto. When the patent issued from the government to defendant's predecessor, the latter was in no better position than if it had, itself, made the grant of the right of way. It and its successors thereafter held the land subject to the existing ditch right, and they owed to the owner of the ditch the same duties that they would have owed, had they, and not the government, been the source of title to the ditch.

The complainant owned not only the right to flow water in the ditch, but it possessed, also, as an essential part of its right, the right to have the entire ditch preserved and maintained. Any encroachment upon the ditch—any interference with its sides, banks, spillways or outlets—constituted an invasion of its rights. If such invasion continued for a sufficiently long period it would ripen into a prescriptive right, and the complainant was therefore justified in resisting any invasion whatever, regardless of whether the invader was the owner of the land through which the ditch ran, and regardless, also, of the extent of the invasion, or the amount of damage resulting therefrom.

The right to the ditch is an entirely different thing from the right to the water flowing therein—as different as the ditch itself is from the water. As said in *McLear v. Hapgood*, 85 Cal. 555, 556, “the ownership of the ditch is entirely distinct from the right to divert the water of the stream”. “Ownership of a ditch and the water right for

waters to flow through the ditch," said the Supreme Court of Idaho in *Swank v. Sweetwater etc Co.*, 98 Pac. 297, "may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party."

In *17 Am. & Eng. Ency. Law*, p. 513, it is said:

"An irrigating ditch or an interest therein is real estate. Physically, of course, a ditch is a part of the land upon which it is dug or constructed, but the ditch and the land on which it is situated may be owned by different persons. So, too, the ownership of a ditch may be entirely distinct from the right to divert the water. *One may own an irrigating ditch without owning a water right, and may protect it from injury.*"

(Italics throughout this brief are ours.)

The distinction here adverted to is clearly set forth in the case of *Nevada etc. Co. v. Kidd*, 37 Cal. 282, 309, cited by appellant. Said Chief Justice Sawyer in that case (p. 307):

"If an action of trespass is not sufficient, it is plain that an action to recover possession of the dam site and dam in process of construction, and of the canal site and canal thereon projected, surveyed, and commenced, would afford a complete and adequate remedy for any injury averred, or that is likely to arise, till the plaintiff is in a condition to use the water, or be injured by its diversion from it by defendants.

* * * * *

"The water right, when acquired, although intimately related to and connected with the site for a dam and canal, and dam and canal

commenced, etc., is a different thing, even though each may be necessary to make the other available or useful. They are capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. *The dam and canal may be trespassed upon, broken down, destroyed or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning plaintiff's right to it, and plaintiff may have its action for the trespass, or to recover the possession of the land constituting the dam and canal, or their site; and the water may, also, be diverted and taken away without in any way disturbing or interfering with the dam and canal. The possession and right of possession of the dam site and dam, and canal site and canal may exist, and a cause of action arise for trespass or ouster long before any present water right capable of injury by diversion and use by other parties has any existence."*

And again on page 315, the writer of the opinion says:

"So, if, before the right of plaintiff to the water should have become perfected, while constructing its dam and canal, with a view to a future diversion and actual appropriation of the water, the defendants should trespass upon and destroy the works, or take possession of the site, a cause of action would arise, but it would be an entirely different cause of action from the other arising from a diversion of the water, and not identical with it in law, or in fact. An action for damages for the injury done, or to recover the possession of the site, would be the remedy. The right to the water does not *yet exist, and it may never vest*. The most that is *in esse*, is, a right to acquire, by reasonable dili-

gence, a future right to the water. The remedy for the two kinds of injury might be different, and the measure of damages would certainly be different, and would require different evidence.”

Since, as appears from the last cited case, a trespass may be committed even upon a ditch containing no water, it is evident that the right of the owner of the ditch to its exclusive possession does not depend upon whether there is any particular amount of water in the ditch at any particular time, nor upon whether he owns any water whatever in the ditch. Neither would an entry upon the ditch be justified because it appeared that the water in the ditch was owned by the party making the entry.

The case last cited is an authority, also, upon the proposition that ejectment will lie to recover a ditch; and this is the doctrine both of the California courts and of this court in cases which, like the one at bar, are controlled by the California law. The established rule in this state is that the owner of the ditch is entitled to the exclusive possession thereof.

In *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. 379, it was held that an action to recover a certain ditch and the water rights appurtenant thereto known as the “Boston Ditch” was “a suit, not for an incorporeal hereditament merely, *but for the ditch itself, and that the action of ejectment would therefore lie*”. In the course of his opinion, Judge Gilbert used the following language:

“Mr. Pomeroy, in his work on Water Rights (section 59) says:

‘There is, of course, a plain distinction between the appropriator’s right to the water which he diverts and his right to the canal, ditch, reservoir, or other structure through which the water is conveyed. *A ditch or canal itself, used for conveying the water to a mine or elsewhere, is not a mere easement or incorporeal hereditament; it is land.*’”

After referring to the cases of *Reed v. Spicer*, 27 Cal. 58, *Canal Co. v. Kidd*, 37 Cal. 282, and *Mitchell v. Mining Co.*, 75 Cal. 464, the writer of the opinion concludes as follows:

“*These decisions are sufficient to establish the doctrine that in California, at least, recovery may be had in ejectment of property such as that described in the complaint in this case. No demurrer was made to the complaint in the court below, nor does it appear that the point here presented was made either on the trial below or in the assignments of error. We have given the question the same consideration, however, to which it would have been entitled had timely objection been made. Undoubtedly, the plaintiff in ejectment, suing for property described as that which is sued for in this case, will, upon his judgment, acquire possession of the ditch wherein the water runs, and of the water running therein, and of the soil beneath, as well as the banks that hold it.*”

In *Trippe v. Overacker*, (Colo.) 1 Pac. 695, 697, it was said:

“The proprietor of an irrigating ditch, whether upon his own premises or those of another, has a property ownership, *both in the*

ditch and the right of way therefor, and using or enlarging such ditch without the owner's consent is as much a taking or damaging of private property, within the meaning of the constitution, as would be appropriating the right of way therefor in the first instance."

The authorities cited show that the right of the complainant was exclusive, and entitled it to the possession of the entire ditch, and that it could have maintained an action of ejectment therefor. It was not obligated to share its ditch with the defendant. Indeed, it would have wholly defeated the purpose for which Congress authorized the granting of rights of way for ditches on the public lands, if it were held that they may be used by the owner of the lands through which they run jointly with the owner of the right of way. Who, we may ask, would avail himself of the privilege of constructing a ditch under these circumstances? It is entirely safe to say that it was never intended by Congress that one who had paid no part of the cost of constructing a ditch—who was not even the owner of the land when it was constructed—could claim the right to use it jointly with its owner.

The right of complainant is comparable with the right obtained by a railroad company for its right of way, in reference to which it was said in *Townsend v. New York etc. R. R. Co.*, 106 N. Y. Supp. 381, 387:

“While this easement exists, the defendant is entitled to the exclusive use, possession, and control of the land; and the owner of the fee

has no right to use, occupy, or interfere with the same in any manner whatever.”

In the case of *Northern Pacific Ry. Co. v. North American Tel. Co.*, (C. C. A. 8th Cir.) 230 Fed. 347, decided December 15, 1916, Circuit Judge Sanborn, delivering the opinion of the Circuit Court of Appeals for the 8th Circuit, said:

“A railway company, which has become the owner of a railroad which it is operating and of a right of way appurtenant thereto, has the *exclusive* right to the use of that right of way for telegraph purposes as well as for railroad purposes.”

See, also,

Southern Pacific Co. v. Burr, 86 Cal. 279.

In *Silver Creek etc. Co. v. Hayes*, 113 Cal. 142, the plaintiffs, who owned a canal, sued the defendants, alleging that they, the plaintiffs, were in possession of said canal and that the defendants without permission from the plaintiffs, had wrongfully entered upon the same, and taken water therefrom. In a cross-complaint, the defendants set up that they owned a large tract of land which it was necessary to irrigate, and that the only waters available for that purpose were the waters of Panoche Creek. It was further alleged that the rights of the defendant to Panoche Creek were superior to the rights of plaintiffs therein.

In holding that the facts stated would not justify the acts complained of by plaintiffs, the Supreme Court of California, speaking through Judge Temple, said:

“No right to water is asserted, nor was it necessary for plaintiffs in order to make a case to show any. The court so held in giving them the relief demanded, while finding that they had no right to water in the creek. The trespass charged did not consist in destroying or injuring the dam or other means by which the water was diverted from the creek, nor in diverting the water in the creek to other uses, but was an injury to the embankments of the ditch and a taking of the water from the ditch itself. Had the alleged trespass consisted in an attempt to prevent the flow into the ditch from the stream, possibly the assertion of a right to have the water flow would be considered, but no such defense could be made here. The cause of action set up by plaintiffs and the rights asserted by defendant have no reference to each other. True, there was water in the ditch, and the evidence shows that it came from Panoche Creek. But the fact that defendant had a superior right to the water flowing in the creek would not justify him in destroying the ditch, or in taking what water he needed from the ditch at points where it passed over or near his land.”

Hayois v. Salt River Valley Canal Co., (Ariz.) 71 Pac. 944, was a suit by the Salt River Valley Canal Co. to enjoin defendants from entering upon an irrigating ditch or canal owned by plaintiff, or interfering with the headgates therein or in any manner obstructing plaintiff from the operation thereof. The complaint set forth the ownership and possession of the ditch by plaintiff; that the defendants had entered into an agreement to enter upon the canal and divert water therefrom to their own use; and that the threatened

acts would result in irreparable damage and injury to plaintiff, etc. The defendants set up in their cross-complaint that they were the owners of certain lands which were irrigated by means of said canal, and that they were also the owners of a portion of the water flowing in the canal. A demurrer to the cross-complaint was sustained by the trial court, and, after trial, judgment passed in favor of the plaintiff. The defendants appealed from this judgment to the Supreme Court of Arizona.

In affirming the judgment, the court said:

“The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it, in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it, in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant or one or more of his co-defendants, his pleading will not be a cross-bill, but an original bill. Enc. Pl. & Pr., vol. 5, p. 640, and cases there cited. The plaintiff's action was brought for the purpose of restraining the defendants from breaking the head gates and interfering with the management of its canal. To the determination of this controversy all questions relating to the ownership of the water were wholly immaterial. It was the ownership of the canal, and not the water, which constituted the basis of the plaintiff's right to the relief it was asking. A *de-*

termination most favorable to the defendants of the various questions sought to be injected by the cross-complaint would have failed to show that they had any interest in the canal, or lawful warrant for interfering with the management and control thereof; and, since the settlement of these questions could have no possible bearing upon the plaintiff's cause of action, they were not matters which could be properly adjudicated in this suit. As was said by the learned judge of the trial court in his opinion: 'Whether they (defendants) are the oldest settlers in the valley, whether they are the first appropriators of water from the Salt river, whether they have an absolute and unquestioned right to the water, no one has the right to forcibly break open the head gates of the canal, or divert water therefrom, in interference with the established rules and regulations of the canal company, because he is not getting the water to which he may be entitled. To hold otherwise, or to allow each user of water to judge for himself of when and how he may use and divert water carried in a canal, and how much he may use, and to exercise such judgment by opening this or that head gate, in opposition to the canal company's management, would be productive of such confusion, waste, ill feeling, and probable violence as to make it impossible for a court to sanction it, on the ground of public policy alone, if on no other ground.' The matters contained in the cross-complaint had no relevancy to the plaintiff's cause of action, and the trial court properly sustained the demurrer thereto.'

Stocker v. Kirtley, (Idaho) 59 Pac. 891, was a suit by the owner of a ditch for an injunction restraining defendant from interfering with the ditch. In delivering the opinion of the Supreme Court of Idaho, Sullivan, J., said:

“The primary object of this action was to restrain appellant from filling respondent’s ditch with placer-mining debris, from running the same on his land, and for damages. Those are the only reliefs specifically prayed for.

* * * * *

It is not essential to the recovery of the specific relief prayed for that respondent establish the allegations of his complaint as to his prior and superior right to any of the waters of said creek, as one may own a ditch, or a ditch and land, independent of a water right, and may protect them from injury.”

We may add that even if it were conceded that defendant possessed originally the rights in the ditch which its counsel claims for it, they were extinguished by the long period of adverse user by complainant’s predecessors. This user, as we have shown, was exclusive and adverse to the entire world, including defendant and its predecessors.

Campbell v. West, 44 Cal. 646.

The cases cited in appellant’s brief on pages 40 and 41, so far from laying down any rule which is opposed to our position, in reality strengthens it, for they show that the owner of the land through which a ditch passes is not entitled to the use of it, unless he has acquired such right either by grant or prescription; *and here there is no proof of either.*

Inasmuch as the “defense” now under consideration is predicated largely upon the claim that during the year 1906 the complainant enlarged the Nicker-

son Ditch, it is proper that the evidence bearing upon the point should be briefly adverted to.

That the ditch was not enlarged conclusively appears, we think, from the testimony of defendant's witnesses, as well as from the evidence introduced by plaintiff. Mr. North (a witness for defendant) who constructed the ditch, stated that it was well constructed (Tr. p. 93), and that as constructed its depth below the "thorough-cut" or graded surface was 3 feet; its width on the bottom was 3 feet, and its width, *measured on the thorough-cut*, was 5 feet (Tr. p. 128). The grade, he testified, was 9.60 feet to the mile (Tr. p. 128); while its capacity, after it had sufficiently settled, was estimated at 1300 inches (Tr. p. 133).

Now, the testimony of Mr. Durbrow, which is undisputed, shows that a ditch of the dimensions testified to by defendant's witnesses, would have a capacity of 1740 inches (Tr. p. 193). This computation was made upon the estimate of Mr. North that the grade of the ditch was 9.60 feet to the mile. In point of fact, however, the grade was more, as shown by the undisputed testimony, all of which indicates that Mr. North somewhat underestimated the capacity of the ditch as originally constructed (Tr. p. 175).

Be that as it may, even if Mr. North's estimate of 1300 inches is accepted, it is clear that there has been no substantial enlargement of the ditch, for the testimony shows that today its capacity does

not exceed 1425 inches (see testimony of Gradon, Tr. p. 177, Huber, Tr. p. 326, Davis, Tr. p. 127). That the capacity of the ditch has not been enlarged is further confirmed by the fact that no witness was able to testify that he saw any enlargement made between the spillway and the head dam, and no witness pretended to have taken any measurements before and after the alleged enlargement (see testimony of Moody that today the ditch would "economically back 1600 inches", Tr. p. 120); and his testimony relative to the old frame in the ditch (Tr. p. 120).

Mr. Davis, who was called and testified on behalf of defendant, stated that the capacity of the ditch was from 1200 to 1500 inches, which is less than North's estimate as to the original capacity. He, moreover, testified that there was no enlargement of the ditch (Tr. p. 280). Mr. Durbrow was in full charge and knew what was done and what moneys were expended. He testified positively that there was no enlargement (Tr. p. 192). His testimony likewise explains how any changes in the form of the ditch occurred, and shows, together with the testimony as to the user and payment of taxes by plaintiff, and its predecessors, that if any change had taken place, plaintiff's predecessors acquired a title to the ditch in its new condition by adverse possession. The testimony given by Gradon, Beik and Lincoln also confirms the correctness of the conclusion that no material enlargement of the ditch has taken place. The testimony of William Hen-

drix (Tr. p. 254) and J. W. Goodwin (Tr. p. 317) is to the same effect.

Again, the ditch, as originally constructed, was admittedly of sufficient size to carry all the water flowing in Little Butte in the summer time. The alleged enlargement, therefore, could not have resulted in taking additional water, as claimed in the answer (p. 13) and as testified to by Mr. Mowry. The only way in which a diversion of the water could have been created was by rebuilding the old dam or putting in a new one, and there is no testimony that that was done. It is true that Mr. Moody suggests that this was the case, but no one else dared go that far, and Moody himself subsequently withdrew his testimony on that point.

That slight changes do not invade any of the rights of the owner of the servient estate, see

9 Ruling Case Law, p. 789,

where it is said:

“But when the change in the condition of the dominant estate effects a change in the degree of use and not in the kind of use, it seems that the right of way by prescription is not effected.”

See also cases collected in note: Ann. Cas. 1914 C, p. 472.

In this connection, it may be noted that it is a *non sequitur* to say that an unlawful enlargement of a ditch gives the land owner any interest in the ditch or in the water flowing therein. The most he could claim would be that he was entitled

either to prevent, by force or by a writ of injunction, any material enlargement or, if the enlargement had actually been made, to restore the old condition, if this could be done without damaging the ditch. It may be admitted that notwithstanding the enlargement, the owner might use his land thus unlawfully encroached upon in any way he chose (provided the ditch right to which the other party was lawfully entitled was not impaired, in which case he in turn would become a wrongdoer), but this would not entitle him to use the entire ditch; nor would it give him any interest therein. If this were the law, for property of the value of \$100 he might become entitled to an interest in a ditch worth half a million dollars. No citation is required for the proposition that an owner of an easement, who, without right, attempts to extend it to the prejudice of the owner of the servient estate does not forfeit his rights.

It is, therefore, respectfully submitted that the court below did not err in holding that the "second affirmative defense" pleaded in defendant's answer did not constitute a defense to this suit.

2. Until water is actually diverted by one into his ditch or upon his land, he obtains no ownership thereof or title thereto. The defendant, therefore, was not the owner of any water flowing in complainant's ditch and for that reason there is no basis for the existence of the claimed right of "recapture".

On pages 51 and 52 of the brief for appellant, the doctrine of "recapture" of chattels is sought to be

applied to this case. It is a sufficient answer to this claim, we think, to call attention to the rule that there can be no ownership of water by one until it has reached his land or been diverted into his ditch. "Neither a riparian proprietor nor an appropriator," said Judge Shaw, delivering the opinion of the Supreme Court in *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 525, "has title or ownership in the water of a stream before it reaches his land, or point of diversion respectively." The same rule is laid down in *Parks etc. Co. v. Hoyt*, 57 Cal. 46, and a host of other cases.

If this be the correct rule, it is clear that the foundation for the application of appellant's "recapture theory" entirely fails, for the latter is predicated upon the ownership of the chattel by the party reclaiming it. Without such ownership, there can, of course, be no possible basis for the contention here advanced.

3. Defendant's theory of "recapture" fails, also, because the prior rights of complainant to the use of the waters of Little Butte Creek are established by the overwhelming weight of the testimony to be prior to those of defendant.

The Master, it is true, declined to find upon this issue, since his determination of other points made that unnecessary. He found, however,—as we shall now proceed to show—facts from which the legal conclusion that complainant's rights in the waters of Little Butte Creek are superior to those of de-

fendant inevitably follows. And these findings, we shall also show, are supported by the overwhelming weight of the evidence.

We have already had occasion to advert to the finding "that after 1890, when the Powers Ditch went out of repair, the Nickerson Ditch took all the water in summer flowing in Little Butte Creek at the Nickerson Dam" (Tr. p. 50). Again, referring to the appropriation made by Mr. Mowry in 1899 near the intake of the old Powers Ditch (Tr. p. 50) the Master found that "for at least nine years all the water in Little Butte had passed down the Nickerson Ditch in summer time and for the same period of time the Snow Ditch water had not come into Little Butte". And on page 53 of the record, speaking of the old upper Powers Ditch which had been rehabilitated by Mowry, he said:

"It is clear at any rate that during the summer time no water ran in it during this period except such water as was made by springs or other seepage below the Nickerson head-dam."

The adverse user of the water of Little Butte Creek during this period of over twenty-five years, as established by their findings, undoubtedly shows a prescriptive right in the predecessors of complainant to the use of the entire flow of said stream.

A brief reference to the evidence will suffice to show that it fully supports the above finding. The Powers (or Walker & West) Ditch and water

right, as it is variously called, are very old (see *Campbell v. West*, 44 Cal. 646, decided in October, 1872). The evidence shows that for many years prior to the construction of the Nickerson Ditch, the Powers Ditch took all of the natural flow of Little Butte in the summer (see testimony of Wm. S. Hendrix, Tr. p. 248; testimony of C. M. Hendrix, Tr. pp.; testimony of North, Tr. p. 266).

Very shortly after the construction of the Nickerson Ditch, the upper end of the Powers Ditch was abandoned. And from that time on, all of the water of Little Butte Creek (except that flowing therein in periods of high water when the amount of water in Little Butte Creek at the Nickerson head-dam exceeded the capacity of the Nickerson Ditch), was carried down the Nickerson Ditch. Unquestionably, this user was adverse to the world, including defendant, and resulted in vesting in complainant's predecessors a valid prescriptive title to the use of the water.

Smith v. Hawkins, 110 Cal. 122;

Alta etc. Co. v. Hancock, 85 Cal. 219.

See testimony of Wm. S. Hendrix, Tr. p. 248; C. M. Hendrix, Tr. p. 266; Davis, Tr. p. 280; North, Tr. pp. 289, 291; Durbrow, Tr. p. 188; Green, Tr. p. 300; Fogg, Tr. p. 310; and Goodwin, Tr. p. 317.

The record establishes, too, a record title in complainant, both to the Powers Ditch and water right, and to the Nickerson Ditch and water right (Tr.

pp. 357-368, 304-310). It will thus be seen that plaintiff's rights in the Little Butte Creek water outrank by many years any claim of Mowry thereto. The latter's claim dates only from March, 1899 (Tr. p. 135).

We submit, therefore, that the defendant wholly failed to establish its claim of priority in the waters of Little Butte Creek.

4. Since the water in question was devoted to public use, defendant could not retake or "recapture" it, but its remedy, if any, was an action for damages.

It will be sufficient here merely to cite some of the authorities which lay down this well settled proposition.

Crescent Canal Co. v. Montgomery, 149 Cal. 252;

Barton v. Riverside, 155 Cal. 513;

Gurnsey v. Northern Cal. Power Co., 160 Cal. 710.

C.

The court did not err in holding that the "third affirmative defense" of defendant was invalid in law.

For our answer to this proposition advanced by appellant in this connection, we respectfully refer the court to the preceding pages of this brief. In addition, a word may be added relative to the case of *Hoyt v. Hart*, 149 Cal. 722, which is so strongly relied upon by appellant.

We think that even the slightest examination will be sufficient to show that this case does not lay

down any proposition which is opposed to our position. All that was there held was that it was legally possible for two parties to both own an interest in and have the right to use a ditch. This proposition, it seems hardly necessary to say, appellee has never denied. That is an entirely different question, however, from the one whether the defendant in the case at bar has, *in fact*, acquired a joint right with complainant in the Nickerson Ditch. In the case of *Fox River etc. Paper Co. v. Kelly*, 35 N. W. 744, 749, it was said:

“The courts hold that the right to the water of a river flowing in a natural channel through a man’s land, and the right to water flowing to it through an artificial water-course constructed on his neighbor’s land, do not stand upon the same ground. *Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 743; *Magor v. Chadwick*, 11 Adol. & E. 571; *Sutcliffe v. Booth*, 32 Law J. Q. B. 136; *Ramehur Pershad Narain Singh v. Koonj Behari Pattuck*, 31 Moak, 771, 33 Moak, 91. In the former case, each riparian proprietor *prima facie* is entitled to the unimpeded flow of the water in its natural channel, *while in the latter case any right to the flow must rest on some grant or arrangement either proven or presumed from or with the owner of the land from which the water is artificially brought, or some other legal origin.*”

In the case at bar, admittedly, defendant has obtained no conveyance of the right to take water from complainant’s ditch; nor has it acquired such right by prescription; and when it acquired its title to the land from the government, it took its subject

to the ditch-right, which was then vested in the predecessors of the complainant. We respectfully submit, therefore, that the case cited furnishes no support for appellant's contention.

D.

The court did not err in failing (as contended by appellant) to find in the decree the nature and extent of complainant's rights.

This proposition having (as we think) been fully answered in the preceding pages of this brief, the argument is respectfully rested thereon.

II.

THE COURT DID NOT ERR IN HOLDING THAT DEFENDANT DID NOT HAVE A PRESCRIPTIVE RIGHT TO USE THE NICKERSON DITCH OR TAKE WATER THEREFROM EXCEPT UPON PAYING THE LAWFUL RATES THEREFOR.

This subject will be found discussed in the brief for appellant at pages 67 to 77.

It is the settled rule that the proof to establish title by adverse possession must be clear and satisfactory.

Clarke v. Clarke, 133 Cal. 669.

In *Snyder v. Colorado etc. Co.*, 181 Fed. 62, 70, Judge Van Devanter said:

“The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but regards them as of no validity against those whose property is

the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost."

1. Defendant's use was not open, continuous, peaceable or adverse.

It is equally well established that, as said by the Supreme Court of California, in *Thomas v. England*, 71 Cal. 460,

"To perfect an easement by occupancy for five years, the enjoyment must be *adverse, continuous, open, peaceable.*"

In the language of the same court in *Bree v. Wheeler*, 129 Cal. 147,

"Interruption of adverse user, however slight, prevents acquisition of title by prescription."

See also:

American Co. v. Bradford, 27 Cal. 368;

Cave v. Crafts, 53 Cal. 138;

Ball v. Kehl, 95 Cal. 613;

Union Mining Co. v. Dangberg, 81 Fed. 91;

(Opinion by Hawley, J.).

Now it cannot be claimed that defendant's use was adverse to plaintiff's predecessors while the water was being paid for by defendant, nor before plaintiff's predecessors were notified by the alleged adverse character of the user.

Ball v. Kehl, 95 Cal. 613;

Unger v. Mooney, 63 Cal. 592;

Tarpey v. Veitch, 22 Cal. App. 292.

The fact that defendant paid for the water for a number of years preceding the close of the year 1905 is thoroughly established by the evidence (Tr. p. 189, Durbrow; Tr. p. 315, Goodwin; Tr. p. 311, Fogg; Tr. p. 302, Peters). The claim of Mowry that he was paying for the use of the *ditch* and not for the use of the water, under an agreement with Mr. Smith, now deceased, is shown to be untenable by all of the evidence in the case. See letter of Mowry (Tr. p. 54); testimony of Durbrow (Tr. p. 190), and Peters (Tr. p. 302), relative to form of bills paid by Mowry; testimony of Fogg (Tr. p. 311); Hendrix (Tr. p. 250); Goodwin (Tr. p. 315).

As to the period after the end of 1905, when the payments ceased, it would be an abuse of language to say that the use of the water made by defendant since 1905 and down to the month of November, 1912, when the action was commenced, was either adverse, continuous, uninterrupted or peaceable. Until after April, 1909, if any water was taken it was taken surreptitiously (Durbrow, Tr. p. 190; Beik, Tr. pp. 216-218; Lincoln, Tr. pp. 228-230). After 1909 to the time of the commencement of the action there were numerous interruptions (Beik, Tr. pp. 214-219; Davis, Tr. pp. 277-288; Lincoln, Tr. pp. 227-230). These interruptions are admitted even by Mowry (Tr. pp. 146-152). Until 1912 no water was taken in the summer time. In fact, the cross-gate at the spillway not having been put in until August, 1912, at least 75 inches of water

in the ditch must have flowed past the spillway prior to that time (Tr. p. 235). The testimony clearly shows that defendant's user was frequently interrupted and that it did not exist in the summer time prior to 1912.

2. The taxes have all been paid by plaintiff and its predecessors, and no taxes have been paid by defendant.

On this point the Master found that

“all taxes since 1888 assessed against the Nickerson Ditch have been paid by the plaintiff or its predecessors and that no taxes on said ditch have been paid by the defendant” (Tr. p. 60).

3. A very insignificant part of the water taken by defendant has been put to beneficial use.

See testimony of William S. Hendrix (Tr. p. 254), that defendant required only 40 or 50 inches of water while it was “washing” which occupied only an hour or an hour and a half daily. See also testimony of Mowry (Tr. p. 144), C. M. Hendrix, (Tr. p. 269). On the other hand, the farmers at Paradise urgently need the water.

As to the requirement that the water should be put to a beneficial use by one claiming a prescriptive title thereto, see

California Pastoral Co. v. Madera Canal Co.,
167 Cal. 78.

4. Both the ditch and water were dedicated to public use and no prescriptive right therefore could be acquired in either so long as such use continued.

Southern Pacific Co. v. Hyatt, 132 Cal. 240;
Leavitt v. Lassen Irrigation Co., 157 Cal. 82.

The water, dedicated as it was to public use, admittedly could not lose its character by a conveyance executed by the owner. Nor could the owner indirectly destroy the public right by permitting an adverse user.

III.

THE COURT DID NOT ERR IN HOLDING THAT COMPLAINANT WAS NOT GUILTY OF LACHES OR OF INEQUITABLE CONDUCT.

The argument of appellant in this connection may be found at pages 77 and 78 of its brief. We are content to submit the same without discussion.

In conclusion, it is respectfully submitted that the position of defendant in its controversy with complainant and the farmers at Paradise is wholly wanting in equity, that it was rightly enjoined from interfering with complainant's ditch or taking water therefrom, except upon paying the lawful rates, and that the decree appealed from should be affirmed.

Dated, San Francisco,
May 28, 1917.

Respectfully submitted,

CHARLES P. EELLS,
HUGH GOODFELLOW,
STANLEY MOORE,
W. H. ORRICK,

Solicitors for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

BROADWAY TOWEL SUPPLY COMPANY,
a Corporation, and AMOS BURG,

Appellants,

vs.

BROWN-MEYER COMPANY, a Corpora-
tion,

Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

TRANSCRIPT OF RECORD.

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INDEX.

Accounting before Master—	Page.
Report of Master.....	61
Condensed Statement of Evidence before Master	68
Exceptions to Master's Report.....	86
Order of Court on Exceptions.....	91
Answer	7
Appeal, Petition for, and Order Allowing.....	92
Appeal, Bond on	93
Appeal, Citation on	101
Appendix of Documentary Evidence.....	104
Assignments of Error.....	96
Bill of Complaint.....	1
Clerk's Certificate of Record on Stipulation of Parties	101
Decree, Interlocutory, for Injunction and Ac- counting	47
Decree, Final	92
Evidence, Condensed Statement on Trial of Case	14
Evidence, Copy of Documents Introduced on Trial	102
Evidence, Condensed Statement of, before Master on Accounting	68
Motion, Defendants', for Leave to File Supple- mental Answer	51
Motion, Affidavits in Support of Same.....	32 to 45
Motion, Exhibits in Support of Same.....	38 and 46
Opinion of Trial Judge.....	44
Order Denying Defendants' Petition to File Sup- plemental Answer	60
Praecipe	99
Stipulation of Parties That Clerk Certify Printed Record Without Comparison.....	102
Supplemental Answer Proposed by Defendants..	57

Names and Addresses of Counsel upon this Appeal:

For Appellants

T. J. GEISLER, 505 Henry Bldg., Portland, Ore.

For Appellee

JOSEPH L. ATKINS, 615 Chamber of Commerce Bldg.,
Portland, Ore.

*In the District Court of the United States for the
District of Oregon.*

Brown-Meyer Company, a Corporation,
Plaintiff,

vs.

Broadway Towel Supply Company, a corpora-
tion, and Amos Burg,
Defendants.

No. 6719.

**BILL OF COMPLAINT.
IN EQUITY.**

To the Judges of the District Court of the United
States for the District of Oregon:

Brown-Meyer Company, a corporation organized
under the laws of the State of Oregon, and located and
doing business in the City of Portland in said state,
brings this its bill against Broadway Towel Supply
Company, a corporation located and doing business in
the City of Portland, state aforesaid, and Amos Burg,
each residents and citizens of the State of Oregon, and
inhabitants of the District of Oregon, and for cause of
suit plaintiff alleges as follows:

I.

That heretofore, on the 13th day of August, 1913,
Charles F. Brown was the true, original and first in-
ventor of a certain new and useful towel holder, not

known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application for patent therefor hereinafter recited, and not in public use or on sale in this country for more than two years prior to his application for patent therefor hereinafter recited; and that no application for a foreign patent for said invention was filed more than twelve months prior to the filing of the application for the hereinafter recited patent in this country.

II.

That the said Charles F. Brown, being as aforesaid the inventor of said improvement and being a citizen of the United States, made application to the proper department of the Government of the United States, to-wit: the Commissioner of Patents, for letters patent in accordance with the then existing acts of congress, and having complied in all respects with the conditions and requirements of said acts on the 3rd day of November, 1914, letters patent of the United States No. 1115895, signed, sealed and executed in due form of law for said invention or discovery were issued and delivered to the plaintiff aforesaid Brown-Meyer Company, as assignee of the said Charles F. Brown, whereby there was secured to it, its successors and assigns for the term of seventeen years from the 3rd day of November, 1914, the full and exclusive right of making, using and vending said improvement to others to be used, which said letters patent are now of record in the patent office of

the United States, and which is ready here in court to be produced.

III.

That a description or specification of the aforesaid improvement was given in the schedule to the aforesaid letters patent, accompanied by said drawings referred to in such schedule and forming a part of said letters patent. The said letters patent and the said specifications thereto annexed which, or an exemplified copy of which plaintiff will produce as directed by this Court, were duly recorded in the Patent Office.

IV.

That by an instrument in writing bearing date August 7, 1913, the said Charles F. Brown duly assigned, transferred and set over unto the plaintiff, Brown-Meyer Company, the entire interest in and to the said invention and letters patent for, to and in the entire United States and all of its states and territories, to be held and enjoyed by it for the life of said patent, which assignment was duly recorded on August 13, 1913, in the patent office of the United States in Liber 192, page 290 of Transfers of Patents as by said assignment with the certificate of recording thereto affixed or a duly certified copy of said assignment in court to be produced will more fully appear, and the plaintiff is now the exclusive owner of said letters patent and of the invention and improvement therein described, and claims and owns all rights secured by said letters patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

Yet the said defendants, well knowing the premises and the rights secured by your orator, as aforesaid, but contriving to injure your orator, and to deprive it of the benefits and advantages which might and otherwise would accrue unto it from said invention after the issuing of the letters patent and after the vesting of the same in your orator, as aforesaid and before the commencement of this suit, did as your orator is informed and believes, without the license or allowance and against the will of your orator, and in violation of its rights and in infringement of the aforesaid letters patent within the District of Oregon and elsewhere in the United States unlawfully and wrongfully, and in defiance of the rights of your orator, make, construct, use, and vend to others to be used, towel holders made according to and employing and containing said invention and that they still continue so to do; and that they are threatening to make the aforesaid towel holders in large quantities and to supply the market therewith and to sell the same.

All in defiance of the rights acquired by and secured to your orator, as aforesaid, and to its great and irreparable loss and injury, and by which it has been and still is being deprived of great gain and profits which they might and otherwise would have obtained, and which have been received and enjoyed, and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

VI.

And your orator further shows unto Your Honors,

on information and belief, that said defendants have sold large quantities of said towel holders, and still have a large quantity on hand which they are still offering for sale, and have made and realized large profits and advantages therefrom, but to what extent and how much exactly your orator does not know, and prays a discovery thereof. And your orator says that the use of said invention by said defendants and their preparation for and avowed determination to continue the same, and their other unlawful acts as aforesaid, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patent in disregard of your orator's rights.

And your orator further shows unto Your Honors that it has caused notice to be given to said defendants of said infringements and of the rights of your orator in the premises, and requested them to desist and refrain therefrom; but they, the defendants, have disregarded said notice and refused to desist from said infringements, and still continue to make, use and sell said towel holders.

And forasmuch as your orator has no adequate relief except in this Court, to the end that the defendant may be compelled to account for and to pay over the income thus unlawfully derived from the violation of the rights of your orator as above, and be restrained from any further violation of said rights, your orator prays that Your Honors may grant a writ of injunction restraining the defendants and each of them from any further construction, or sale or use in any manner of said patented

invention or any part thereof, in violation of the rights of your orator as aforesaid, and that the towel holders now in the use of the said defendants may be destroyed, or delivered up to your orator for that purpose. And also, that Your Honors, upon the entering of a decree for infringement, as above prayed for, may proceed to assess, or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orator has sustained by reason of such infringement, and that Your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by the said defendants as herein set forth.

And your orator also prays for a provisional or preliminary injunction, and for such other relief as the equity of the case may require, and as to Your Honors may seem meet.

(Signed) BROWN-MEYER CO.,

R. P. Meyer,

Vice-Pres.

Joseph L. Atkins,

Solicitor for Plaintiff.

Here follows verification.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

ANSWER.

IN EQUITY.

Now come the Broadway Towel Supply Company, erroneously described as being a corporation, but in fact being a co-partnership composed of Amos Burg, Charles W. Burg and W. C. Smith, all of Portland, Oregon, and doing business as Broadway Towel Supply Company, these defendants appearing by T. J. Geisler, their attorney, and make answer to the bill of complaint herein as follows:

I.

These defendants deny that Charles F. Brown at any time was the true, or original, or first inventor of a certain new or useful towel holder not known or used by others in this country before his invention or discovery thereof, nor patented or described in any printed publication in this, or any foreign country before his invention or discovery thereof.

II.

That these defendants deny any knowledge or information sufficient to form a belief as to whether said Charles F. Brown at any time made an application for Letters Patent of the United States. They admit that letters patent of the United States, bearing date the 3d day of November, 1914, numbered 1,115,895 were is-

sued to the plaintiff herein, as alleged assignee and successor of said Charles F. Brown, but that said letters patent refer merely to certain specific, limited and narrow improvements in towel holders, as hereinafter more fully set forth.

III.

These defendants deny any knowledge or information sufficient to form a belief as to whether or not said Charles F. Brown ever assigned, transferred, or set over unto the plaintiff the entire, or any interest in said alleged invention, or the letters patent therefor in or to the United States, or any of its states or territories, or as to whether the plaintiff now is the exclusive owner of, or has any interest in said letters patent, or the invention or improvement therein described.

IV.

These defendants further deny that they, well knowing of any rights vested in the plaintiff or in its said alleged assignor, Charles F. Brown, or for the purpose of contriving to injure either of them, or to deprive either of them of any benefits or advantages which otherwise might or could accrue unto them, or either of them from any invention of the said Charles F. Brown, or after the issuing of any letters patent to plaintiff, or before the commencement of this suit, without license or allowance, or against the will of plaintiff, or in violation of its rights under said letters patent within the district of Oregon or elsewhere in the United States unlawfully, or wrongfully, or in defiance of the rights of the plaintiff or otherwise did make, construct or use, or vend to oth-

ers, towel holders made according to, or employing or containing said alleged invention, or that they are at present so doing. Or that they are threatening to make towel holders embodying said alleged invention, or to supply the market therewith, or to sell the same.

These defendants further deny that they did anything in the premises at any time in defiance of any rights acquired or secured by plaintiff, or to its loss or injury, or by which the plaintiff has been or is being deprived of any gain or profit which plaintiff might, or otherwise would have obtained.

These defendants further deny that they have sold large quantities of towel holders embodying said alleged improvement, or that they have a large quantity of such towel holders on hand which they are offering for sale, or that they made or realized any profits or advantages therefrom, except that defendants admit that they did, for a limited time, use towel holders embodying the invention set forth in said alleged letters patent, such use being under the circumstances and conditions as hereinafter set forth, and not otherwise.

And these defendants further deny that they have, or are still making or using, or selling towel holders embodying the improvements set forth in said alleged letters patent, or ever made or used the same, except as hereinafter specifically stated.

And these defendants for a further and separate defense herein allege:

That the alleged invention of said Charles F. Brown

related to towel holders designed for supplying individual towels to users, and that this was a well and highly developed art before said Brown entered into the field with his said alleged improvement, as is shown by the following patents:

Letters Patent of U. S. issued to:

N. S. Baldwin and E. S. Goodwin, Number 557,754, date Apr. 7, 1896.

J. G. Cooner, Number 908,076, date Dec. 29, 1908.

J. Rouso, Number 42,398, Des., date Apr. 9, 1912.

L. Straub, Number 1,038,984, date Sept. 17, 1912.

T. K. Taylor, Number 1,052,292, date Feb. 4, 1913.

C. Reid, Number 1,067,622, date July 15, 1913.

T. Heins and E. R. Galland, Number 1,078,501, date Nov. 11, 1913.

That therefore, the alleged improvement of said Brown, if it did constitute an invention, was of a very specific and limited character, and must be construed accordingly in order not to encroach upon the rights which were vested in the general public prior to and at the time said Brown entered said field.

That when said application for letters patent referred to by plaintiff in his bill of complaint came up for examination before the Commissioner of Patents of the United States, the latter rejected said application because of the alleged invention therein described and claimed as lacking patentable novelty, and cited against the same the above specified letters patents, and that thereupon said Brown amended his said application so

as to distinguish his alleged invention from and disclaim the prior state of the art as described by said patents; and likewise then waived, abandoned and cancelled the broader claims theretofore made by him in his said application and restricted himself to the specific claims now appearing in said letters patent.

That the defendants admit that they made and used a few towel holders embodying the features set forth in said claims of said alleged letters patent, but such making occurred some time before said letters patent were issued, and before the defendants had any knowledge of said Brown's alleged invention, or that said letters patent were to be issued therefor; and immediately after the defendants were informed of said letters patent, they notified the plaintiff that they would discontinue the use of towel holders embodying features covered by said letters patent, and did thereupon proceed immediately to change over their said towel holders, so that same would and did not infringe upon said letters patent. That said defendants used their said towel holders during the period from November 3d to about November 30, 1914. That the towel holders so used were used by said defendants in supplying customers of theirs with whom they had been dealing for a long time prior to said November 3d, 1914. That such customers did not desire to be supplied with towel holders embodying plaintiff's alleged improvement, but merely desired any device which the defendants would supply for that purpose. That the business of supplying laundry towels in connection with towel holders is one of considerable expense and sharp competition, and that defendants made no

profit in using said towel holders during said period between November 3d and November 30, 1914, and that the plaintiff suffered no loss or damage by defendants' acts whatsoever. Nevertheless, for the purpose of amicably adjusting the matter with the plaintiff, the defendants, prior to the commencement of this suit, offered to pay the plaintiff the sum of Twenty-five (\$25) Dollars, and promised not to use the improvement covered by said alleged letters patent, and did faithfully live up to such promise, for they did not use any towel holders embodying said improvement since about said 30th day of November, 1914; but the plaintiff declined said offer, and refused to accept any other sum in settlement of its alleged damages whatever, except the sum of Five Hundred (\$500) Dollars, which demand was exorbitant and wholly without equity, and therefore these defendants refused to pay the same.

And the defendants further allege that the plaintiff is wrongfully trying to drive these defendants out of the business of supplying towels in connection with a fixture of any kind, notwithstanding the plaintiff well knows that the defendants, ever since said 30th day of November, 1914, have been, and are still using only such device as is open to use by the general public.

That the plaintiff, notwithstanding the premises, has threatened, and instead of confining itself to this suit and await the termination thereof, is threatening to bring other suits against the various customers of these defendants, pretending that the towel holder which the defendants are using is an infringement upon said al-

leged letters patent, although well knowing that such is not the case as aforesaid; and if plaintiff be permitted to proceed in such threatened conduct these defendants will be greatly and irreparably injured, and their rights in the premises cannot be protected save by a restraining order of this Court against the plaintiff during the pendency of this suit.

WHEREFORE, the defendants pray that the bill of complaint herein be dismissed, and that they have their costs and disbursements wrongfully incurred herein; and that the defendants also have such other and further relief in the premises against the plaintiff as to the Court may seem just and in accordance with equity.

BROADWAY TOWEL SUPPLY COMPANY,

By Amos Burg,

Member of Firm,

Amos Burg.

T. J. GEISLER,

Solicitor for Defendants.

Here follows verification.

(Title.)

A CONDENSED STATEMENT OF THE TESTIMONY
TAKEN ON THE TRIAL
OF THIS CASE.

RALPH P. MEYER, called as a witness on behalf of plaintiff, being first duly sworn.

DIRECT EXAMINATION.

Questions by Mr. Atkins:

I am the vice president of the Brown-Meyer Company, the plaintiff in this case.

Plaintiff's Exhibit A in the case is the patent to C. F. Brown. It is a towel device for the use of individual towels in public use. On this patent this suit is brought.

This article (referring to Plaintiff's Exhibit C) is the article described in the patent in suit, and in use in different public buildings in the city. It corresponds in every particular with the device described in the patent. In service, that is, in practice, this shelf is placed on the wall, with screws fastened in. We have a plate, and we have an assembling member that fits in this plate with a shoulder, an eye through the assembling member whereby the chain connects the assembling member with a lock, and the shackle on the lock to the eye underneath the shelf. That admits of the towels being freely handled in this method. This shackle fits through the loop of the chain that it locks. That retains the towels. Now, the length of the chain gives plenty of room for more than one individual to use it, giving freedom

of the chain so that two or three could use it in case of necessity. The towel is brought over, used, and dropped into a receptacle, or on the floor.

A device similar to that device was used by the defendants. It resembles this device in evidence exactly. It was an exact duplicate.

Knowledge of such use by defendants first came to me about November 10, 1914. Such use was made in the Courthouse of the city, and the Broadway building. The Crystal Laundry Company used the device in the latter place, and the Broadway Towel Supply Company used it in the Courthouse.

MR. GEISLER: We have those devices here, and when it comes to our part of the testimony, we will introduce them in evidence.

COURT: You admit that defendants' device as used between November 3, 1914, and about the beginning of December, 1914, is an infringement of the patented device?

MR. GEISLER: Well, it was at that time. It is not now.

COURT: Because you are not using it, or have you changed it?

MR. GEISLER: We have changed it, your Honor. Device in evidence marked "Plaintiff's Exhibit C."

Both of the defendants used this device about the month of August, 1914, prior to our patent. This use began with the Broadway Towel Supply in the Courthouse in August of 1914. We had the contract there,

defendants' device was put in at a cheaper price, and we lost the contract from July of that year.

The defendant, the Broadway Towel Supply Company used this device, substantially identical with ours, to oust us from our contract in the Courthouse.

The use of this device by defendant continued until after we had acquired our patent, and our attorney had written them regarding the infringement. After that day, they made some little change in it.

I think that the device which they are now using is an infringement of our patent.

I saw that device in use in the Courthouse last Friday. Referring to Plaintiff's Exhibit C. The free end of the chain is secured to the bottom of this upright post, and the latter is also secured in place by the shackle of the lock. The latter is inserted through the end of the chain, which we open up a link a little bit, and that slips through, and then it enters into the assembling member here (illustrating on Exhibit C) and that connects the two. The construction of this chain is such as to permit the expanding of the terminal link to receive the shackle. It answers the purpose of a ring.

CROSS EXAMINATION by Mr. Geisler.

Q. You say that the Broadway Towel Supply Co. commenced using this device which you claimed was an infringement on your letters patent in August, 1914, for the purpose of ousting you, in the use of your device, from the Courthouse?

A. I did.

Q. What makes you make that statement?

A. Well, we had the contract, and the Broadway Towel Supply had been running after them, and they agreed to put in the same device at a cheaper price, and the Courthouse accepted the proposition.

Q. You had a contract with the Courthouse of Multnomah County, you say, at that time?

A. I did.

Q. Is it not a fact that your contract with Multnomah County Courthouse expired about July 1, 1914?

A. It did.

Q. Then, what makes you say, I repeat, that the Broadway Towel Supply Company ousted you from the Multnomah County Courthouse?

A. Because Multnomah Courthouse informed us that the price was cheaper, and they could get the same thing to hold their towels that we had, and they naturally would accept the cheaper price.

Q. It was awarded, I understand, to the Broadway Towel Supply Company on competitive bid, was it, or not?

A. I think not. We had no bid whatsoever. We were just notified. We never had a bid on the contract. That would be the 1914 to 1915 year.

Q. You did not bid, then, for the work at the Multnomah County Courthouse?

A. No.

Q. In fact, you made no attempt to renew your contract with the Multnomah County Courthouse? Is that correct?

A. They didn't give us any opportunity.

Q. And you just let the matter rest?

A. No; oh, no.

Q. What did you do to try to get a contract from the Multnomah County Courthouse?

A. I went to see them about it, and asked them why we should lose it. The service was satisfactory.

Q. I will show you here a model, consisting of an upright support, which we will assume represents a wall, and on that wall is affixed a bracket—is that correct? Which bracket corresponds with the bracket of the device that you put in evidence.

A. Well, I don't know as the bracket makes any difference, whether it is underneath or above.

Q. Well, it is a mere shelf?

A. It is a shelf.

Q. And this shelf on this model that I speak of is a mere shelf?

A. That is a shelf.

MR. ATKINS: If your Honor please, I should like to ask whether this model is to be offered in evidence?

COURT: I presume it will be.

MR. GEISLER: Oh, yes. If it wouldn't be out of turn, I would offer it in evidence now, as far as that

is concerned. Do you consent to my offering it in evidence now?

MR. ATKINS: When it is proven, yes.

MR. GEISLER: All right.

Defendants here introduce in evidence, by consent, device marked "Defendants' Exhibit 1."

A photo cut of such device is here shown.

Cross examination continued.

That was the device which was used by defendants from November 3d to December 1, 1914.

After December 1st a change was made in this device.

The basket has a piece of metal by which the ring is fastened. This ring is open on the side, thereby giving a link to which to fasten the lower end of the chain, just the simple matter of looping it over. Now, it is just as easy, unlooped, to slip that off and shackle it back to the original upright. It is not fastened firmly there. It is made for the purpose of slipping off. And it appears to me that that is just getting away slightly from the connection to the upright.

Prior to December 1st the defendant Broadway Towel Supply Company, and also the Crystal Laundry Company, fastened the lower end of the chain to the shackle of the lock, and the lock itself was fastened to the bottom end of the post.

Then the lower end of the chain was removed from the shackle of the lock, the lock was merely used thenceforth to keep the post in place, and the lower end of the

chain, instead of being in any way connected with the shackle of the lock, or to the bottom end of the post, was fastened to a ring in the basket.

Plaintiff rests.

WILLIAM C. SCHMITT, called as witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. Geisler.

MR. GEISLER: I offer in evidence the file wrapper covering the plaintiff's patent.

Marked "Defendants' Exhibit 2."

MR. GEISLER: I will next offer in evidence the patents which are cited by the examiner in this case, and which the inventor had to avoid in order to get even the narrow patent that he did get. The first patent I offer in evidence is that granted to N. S. Baldwin and E. S. Goodwin, April 7, 1896, No. 557,754.

Marked "Defendants' Exhibit 3."

I next offer the patent granted to J. G. Cooner, December 29, 1908, No. 908,076.

Marked "Defendants' Exhibit 4."

I next offer the patent issued to J. Rousso, April 9, 1912, No. 42,398.

Marked "Defendants' Exhibit 5."

I next offer the patent issued to T. K. Taylor, February 4, 1913, No. 1,052,292.

Marked "Defendants' Exhibit 6."

Next the patent issued to Guy Reid, July 15, 1913, No. 1,067,622.

Marked "Defendants' Exhibit 7."

MR. GEISLER: I call particular attention to this patent of Guy Reed as showing all the essentials of the alleged invention, barring the moving of the point of the chain from one place to another.

I also offer in evidence the patent issued to T. Heins et al., November 11, 1913, No. 1,078,501.

Marked "Defendants' Exhibit 8."

Also the patent issued to Louis Straub, September 17, 1912, No. 1,038,984.

Marked "Defendants' Exhibit 9."

MR. SCHMITT testified: I am 29 years of age and reside at 380 East Forty-fourth Street North, this city.

I am a civil engineer and mechanical expert.

I graduated from Notre Dame University in June, 1910, in the Civil Engineering department.

Since I graduated from college I have been following particularly patent work.

I am now engaged in such work, in addition to general engineering work.

I am also regularly admitted to practice before the United States Patent Office.

Witness shown patent issued to L. Straub, being "Defendants' Exhibit 9."

I have examined that patent. This model embodies the particular features shown in this patent to Straub.

Model offered in evidence as "Defendants' Exhibit 10."

Model admitted subject to objection if it fails to correspond with patent.

The post in the Straub device has a rotary movement similar to the post in the Brown patent.

With respect to the use of means for holding this Straub rotary post in place, so that it cannot be withdrawn, I do not think there is anything specially original to use means such as employed for that purpose by Brown in his patent. It would be a waste to use two locks, one for locking each post, so therefore that locking bar is substituted, which permits the use of one lock to keep both posts from being withdrawn or rotated. I consider this post, which is made with a curved end, and which is adapted to be rotated, to be the equivalent of the post in the Brown device.

I have examined the Reid patent, No. 1,067,622, being Defendants' Exhibit 7.

Model marked "Defendants' Exhibit 11" offered in evidence as representing the Reid patent. Model admitted subject to objection for any discrepancies that may be pointed out therein.

Witness continues:

Figure 4 of the Reid patent shows another construction, and in this case it is practically identical with the construction of the patent in suit, except that in the Reid

device the end of the chain is fastened to the wall instead of being fastened to the end of a post.

COURT: That is the very thing that the defendants want to get away from here. The end of the chain is fastened to a basket instead of being fastened to the end of a post. But I understand the Patent Office has said in effect that that device was not an infringement upon the plaintiff's device; that is to say, the Patent Office had this device under consideration at the time it issued plaintiff's patent.

MR. GEISLER: Exactly, your Honor.

COURT: Well, do you want this Court to say that the Patent Office is mistaken in that respect?

MR. GEISLER: No, your Honor. No, I wish the Court to affirm the decision of the Patent Office.

COURT: Well, I understand the Patent Office, when it issued the plaintiff's device, had this device before it, and, notwithstanding the consideration of this device, it issued the plaintiff's patent.

MR. GEISLER: Yes, your Honor, correct.

COURT: So therefore the Patent Office has said that this device was not an anticipation of the plaintiff's device.

MR. GEISLER: And in that the Patent Office, we will say, was correct. It is a very close question. This is a combination patent which the Patent Office granted to Brown. A combination patent assumes that each of the elements which are associated in a particular form are old and public property, because it was in the

power of the application for patent, if he chose and if he so claimed, to cover any particular element by itself, irrespective of the combination. But in this particular case there are four claims allowed, and each of these four claims covers merely a combination. Now, then, it also is governed by the rule which controls combination patents, as laid down by our United States Supreme Court, and followed in every tribunal where the question has come up, which rule is this: That, in order to anticipate or infringe a combination patent, the two devices which are compared must agree in three different particulars. Those three particulars are (1) the means must be identical; the law of cooperation which controls the use of the means must be identical; the purpose for which the means was so cooperatively employed must be identical. And failure in that particular, or in any one of these points of comparison, would make the device, as the case may be, either an anticipating device or an infringing device. Now, as far as the two devices here are concerned, there is quite an elaborate argument in the file wrapper. In the first place, the examiner decided not to allow anything. Finally, by the persuasion of counsel, he was induced to allow this narrow claim. The narrow claim, your Honor, merely introduces a purpose and a new result in the Brown device which differentiates it from the Reid device. We claim that we are following the Reid device, and not the Brown device. The Reid device, of course, was applied for before the Brown device was applied for. In fact, the patent had been issued before the Brown application was placed on file. So it is presumed, as a matter of law, of course, that Brown, what-

ever he invented, invented with the Reid device in his mind, and attempted to get some improvement over that, which Reid did not have.

And just one more matter. The only point that he claimed is this, your Honor—that by bringing the two ends of the chain closely together he gets a greater sweep of the chain, and claims to have greater convenience. And if we take the Reid device and bring the lower end of the chain in close proximity with the upper end, then we get the same sweep of the chain that the plaintiff has made such a difference as to entitle him to a patent; and on that alone was the patent issued.

COURT: This is a very narrow issue. You claim that you are using more nearly the Reid device than you are the Brown device?

MR. GEISLER: Yes, your Honor.

Examination of witness continued:

I have looked over the Brown device and find that all of the elements in there are old, well-known elements. I cannot find a single one that has not been well known for some time.

CROSS EXAMINATION.

I referred to elements of this device singly by themselves.

I am acquainted with the Brown patent sued upon in this case, and am familiar with the construction of the device and the mode of its operation.

Plaintiff's Exhibit C correctly represents the subject matter of the Brown patent. The assembling member

or post is secured to the shelf by a lock, which prevents it from being drawn out.

The lock also performs the function of securing the end of the chain to the bottom of the assembling member. It serves, as a single element, to perform those two functions.

When the towels for service are laid upon the shelf, the apertures 22 on the corner of them, as shown here, are brought into line with the socket in the shelf. When so aligned, the assembling member may be introduced through all of the apertures of the towels into the socket, but it strikes me a more practical way would be just to string them on here first.

If the pile of towels were arranged with the apertures in the corner in line, that pile could be laid upon the socket and secured as a single member to the shelf, by the introduction through the apertures of the assembling member without handling the intermediate towels.

When the towels are in place upon the shelf, the topmost towel can be removed and strung out upon the chain and the user therefore has the full stretch of the chain to enable him, or to permit him, to use the towel, without coming in contact with the shelf. It would be possible for several to use towels upon that chain at the same time without interfering one with another, through perhaps each one would not have the same efficiency as if they were using them singly.

COURT: That would depend upon the length of the chain?

MR. ATKINS: Exactly.

Referring to the model, Defendants' Exhibit 11, there is a different type of lock in the Reid patent, though they are both standard locks.

The end of the projecting arm shown in the model Exhibit 11 is different from that shown in the Reid patent. The end of said arm, to which the chain is attached, is also different from that shown in the patent. It is curved to a different degree. The construction shown in the two patents shows curved ends on each of them, but the degree of curve is different in the model.

The difference between the model and the Reid patent is adapted to correct a deficiency in the Reid construction. It would appear to me that that curvature was put on there in order to keep the towels from slipping. The device on the free end of the chain in the Reid patent is different from that shown in the model, No. 11.

Referring to the Straub patent, Defendants' Exhibit 9, the bail, section 6, as it is called in that patent, is immovable while in service. It is only movable for the purpose of applying towels to it. When the towels are applied it is immovable. The soiled towels are separated from the clean towels in service only by the width of the receiving plate 2. There is no chain connection of any sort on the Straub device.

There is this difference between plaintiff's device and the Straub device, in respect to the assembling member 4 of the one and the bail section 6 of the other, namely, that plaintiff's assembling member 4 is rotat-

able when it is in service, and the Straub bail section 6 is rotatable only when it is not in service.

W. C. H. SMITH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the partners of the Broadway Towel Supply Company, and was such partner in July, 1914.

I heard Mr. Meyer testify here about ousting plaintiff's device from the Multnomah County Courthouse, and the instituting of our own towel rack. The circumstances in connection with our getting the business there at the Courthouse were:

I went up to the Courthouse, and I was talking to the commissioners there, and I had asked them if I could get the business, and they told me yes. And I knew a couple of them pretty well. I took the bid at 28 cents a hundred. They asked me if I could put the towels in for that. I told them yes. So they gave me a contract for one year. They never asked me what kind of shelf I would put in, or anything. They just asked me if I would put in the towels. I told them I would. So I finally had a rack made, and I seen the racks they had in there, and I took the copy of them, but not exactly like theirs—a little bit different. And I noticed underneath the rack there was no patent, nor nothing on the racks to show there was any patent on them. And thinking there was no harm about it, I went ahead and had the carpenter make some. A little while afterwards, I was notified not to use those racks any more. So I

finally went to Mr. Geisler, and he told me he would see into the matter. So I left it to him, and finally he told me to make a change. I finally made the change. I disconnected the chain from the lock and fastened it into the basket. And from that time on I went every day, and noticed the chains were never put back onto the locks any more. They was always fastened to the basket.

The County Commissioners did not demand of me that we furnish any particular kind of device.

I first found out that Mr. Brown, or Brown-Meyer Company, or the Yale Laundry Company, claimed a patent on their towel rack about a week later. I think it was a week later. I went down to one of the buildings, and I looked at the shelves there to see if there was any patent applied for, and I found out there was just a little stamp, stencil stamp, was put underneath the board. There was "Patent applied for" and that is all I noticed.

I first found out that they had obtained a patent I think in November, 1914. Then I went to see our attorney about it, to find out the facts in the case with regard to the patent.

And then after that I made this change of disconnecting the lower end of the chain from the bottom of that post and dropping it into a basket, fastening it to a basket.

After I made that change, I had occasion to go into the buildings where the device was used, and see how it was being used every day, and found that they were

using it just the way that I told them to use it, with the lower end of the chain disconnected with the bottom of the post.

MR. GEISLER: Mr. Atkins and I are going to stipulate that the Broadway Towel Supply Company, for the purpose of adjusting this infringement between November 3, 1914, and approximately December 1, 1914, offered to pay the plaintiff here \$25. It is so alleged in the answer, and by stipulating it, we can shorten the record.

MR. ATKINS: Yes.

MR. GEISLER: And that the offer was made after we had given them an itemized statement showing that the actual profit made was not to exceed \$7.50 for the use of that same device during that period of time. Also that the plaintiff refused the offer, that is to say, Brown-Meyer Company, and demanded the sum of \$500 in settlement of that period. That is correct.

MR. ATKINS: It is stipulated to that extent, except, of course, as to the itemized statement, we know nothing about that. There was a statement rendered, but it was not made under oath, and it did not conform to our view of the facts. We do stipulate that there were negotiations for settlement, that an offer of \$25 was made, and that a counter proposition was made.

MR. GEISLER: We are also going to stipulate, I believe, that we have witnesses here that will corroborate Mr. Smith, on behalf of the Broadway Towel Supply Company, and Mr. Clancy, who will testify later in behalf of the Crystal Laundry Company, to the effect

that it was their duty in the capacity of janitor or superintendent of these various buildings to inspect these devices as used in their buildings daily, and that they were not used other than by having the lower end of the chain hanging down and connected to a basket; not used as the Brown device was used, but used as we demonstrate here.

Examination of witness continued:

I kept the books of the Broadway Towel Supply Company, and I kept track of the towels I put in every day in the buildings, and I don't think our profits amount to over about \$7.50 for that time till we started putting the chains underneath. Really there is no profit in it at all; hardly, to keep the whole business.

CROSS EXAMINATION.

In examining the plaintiff's devices in the Court-house, I found no patent mark. Later, after we were notified, I found "Patented" marked on some of the devices that were used.

I made this change I referred to just after I was notified not to use them under the lock any more.

I got a notice not to use the chains fastened to the lock any more, to discontinue from using them. I finally put them to the end of the basket. That was, I think, just some time near December 1, 1914, after the patent came out.

It was about the 3d of November, 1914, that I got notice from the lawyer not to use them chains any more the way I was using them.

I had consulted Mr. Geisler with regard to the question of infringement at that time.

We got notice from plaintiff's company to desist from infringement.

My attorney told me not to fasten the chains underneath the lock any more, so I guess he must have had the notice.

I used this particular kind of device in the Courthouse because I saw it there, and I didn't think there was any patent on it; it is such a simple thing to copy after. There was no "Patent applied for," I think, which the law requires, when you put out an appliance, that you have to put on it before you put them out. That is the way I understand it.

I did not reproduce the plaintiff's device exactly. Ours is a little different, but it works just the same as the other, and was a substantial duplicate of it.

I was not required to use any particular sanitary device in the Courthouse. I was just to put in my own ideas, but was required to install some such device. The one I installed was the one they had been using before I put ours in.

Here defendants offered in evidence an extract of the Ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29,270, pertaining to the prohibition of roller towels in public places, and such extract of the Ordinance was duly received and reads as follows:

An Ordinance to prohibit common drinking cups and common towels in the City of Portland, and providing a penalty for the violation thereof, the City of Portland does ordain as follows:

1. No person, firm or corporation in control of, or in charge in the city * * * public building * * * or in any lavatory maintained or used by the general public shall place, furnish or keep any common towel for public use, or permit their use.

2. * * * The term 'common towel' as used herein shall be construed to mean roller towel, or towel intended or available for common use by more than one person and not being laundered after such use.

3. Any person, firm or corporation violating any of the provisions of the Ordinance shall, upon conviction thereof in the municipal court be punished by a fine of not less than ten dollars nor more than two hundred dollars.

Passed by Council, July 29, 1914.

AMOS BURG, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I reside in Portland, and am one of the partners of the Broadway Towel Supply Company.

I went down to see Mr. Brown. I says, "It is a pity that we have to go to court for a trifle like this. Let's settle it up, whatever it is." So he didn't give me any

particular answer; he thought it best for the court to decide it. So later on we arranged a meeting. We have what is called a Laundrymen's Club here in the city. And Mr. Brown and myself, Mr. Meyer and Mr. Allen, we met up there.

We talked the matter over, and the Brown-Yale people, or Mr. Meyer and Mr. Brown, told us that they would settle for \$250.00. We, we wasn't prepared—there was another party into it, Mr. Bechtel, from the Palace Laundry, and we were to see him in the meantime—I think he was out of the city; or some way Mr. Allen was to see him. And finally Mr. Allen telephoned me, and he says, "You better see Mr. Bechtel, because I can't catch him."

The first thing we knew, why, they sued us, and that was the end of it. We asked Mr. Brown to give us ten days to consider settlement. There may have been some two weeks thereafter before action was brought.

Our profits on the towel supply between the 3d of November and the first of December, 1914, figures \$7.50 but we offered them \$25.

CROSS EXAMINATION.

This conference took place before the suit was brought.

P. G. ALLEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

MR. GEISLER: Now, with respect to the Crystal Laundry Company, defendant, we will stipulate, if your Honor please, if Mr. Atkins will consent, that they made

an offer of \$50 to settle for the infringement during the period from November 3, 1914, to December 1, 1914, and that the offer was declined, and the plaintiff corporation demanded \$300. Isn't that right?

MR. ATKINS: As set forth in the answer, whatever that is. In agreeing to this stipulation, of course, your Honor will observe that there was a difference in each case between the plaintiff and the defendant as to the nature of the infringement. They wish to hold that they had entirely avoided infringement, and it was upon some such basis as that that a mere nominal offer of settlement was made. Our offer of settlement was a complete settlement, as affecting the relative rights of the parties under the patent. So that it comes right down to the question in issue as to infringement. With that statement, why, the stipulation is made.

DIRECT EXAMINATION.

I am president and manager of the Crystal Laundry Company.

I first heard of the Brown patent some time during November, 1914.

I immediately, after receiving a letter from Mr. Atkins calling my attention to the fact that we were infringing on this particular patent of theirs—I called on Mr. Brown the following morning. And in his office we were discussing what kind of terms we could come to on our infringement if we had one. I told him that if he had a patent, I appreciated the fact, but I would like to see if he did have a patent, and if he had one, we

would see if we could come to some kind of understanding, whether we should go on and use it or discontinue it, or what. At that time Mr. Brown said it would be a matter he would have to refer to Mr. Atkins, his attorney.

The same day, I think in the afternoon, I called on Mr. Atkins at his office, and, after talking with him, he said that he didn't know exactly what would be the amount, but he would take it up with Mr. Brown again, and referred me back to Mr. Brown. Then I called on Mr. Brown again, and then he called in Mr. Meyer, and after a lengthy discussion one way and the other, it seemed to me that they didn't want a settlement on infringement basis, but they wanted to restrict us to the right to make a certain price on these towels; if we could come to a price that we would establish and maintain by their dictation, then they would be willing to make a price. So after we talked there quite awhile, why, Mr. Meyer and Mr. Brown both said—well, they referred back to their attorney, and we would make an appointment at such a time, we would all meet there. And I think that same day at one o'clock we met in Mr. Atkins' office. Mr. Meyer was there, but Mr. Brown was not there. And after we talked about it quite a bit again, I told them that I would not consent to any such proposition that would allow them to dictate the price that we should furnish these towels for, and if that was the only settlement, it would be out of the question; that we would discontinue the use of it if they had a patent. At that time I didn't know if they had a patent or not. And I told them that I would make an offer of an amount,

and if that was satisfactory, providing their patent was right, we would settle that way. Otherwise I would take it up and consult an attorney, and see whether we had any rights or not, or whether there was a patent.

The following day I consulted attorney T. J. Geisler, who sent to Washington to get the record of the case.

After we had gotten the record and looked it over in consultation with our attorney, I made a reasonable offer, that is, what I thought was better than to have any litigation over it. I made an offer to the Brown-Meyer people of \$100, and at that time they wouldn't consider it. They said they wanted \$300, and a restriction on the price; that is, they wanted to say towels should be furnished at a certain price. And I told them that, under those conditions, we would discontinue using the part of the patent that they claimed was an infringement; and we did so at that time.

The profit the Crystal Laundry Company made in using this device similar to the Brown patent from November 3d to December 1, 1914, was about \$15.07.

I made a statement of that to the other parties.

I authorized our attorney to offer \$50, but it was not accepted.

I afterwards had a meeting with Mr. Brown, Mr. Meyer, Mr. Burg and myself, at Commercial Club building. There was quite a lengthy discussion relative to whether or not we would give them the rights to maintain a price on these particular towels; and after spend-

ing considerable time talking one way and the other, Mr. Brown said, "Well, we will make you a proposition." He says, "There is three of you. There is the Palace Laundry that has a rack, and there is Broadway Towel Supply Company, and yourself; and we will make you a proposition of \$250 for the three. That will cover this infringement." Mr. Bechtel not being present, we suggested that if he would give us a reasonable amount of time, we would take it up with Mr. Bechtel, and if that was satisfactory, he would hear from us later, within 10 days, something to that effect; but this suit was commenced before we saw Mr. Bechtel.

In offering the \$100, I didn't consider that it was worth \$100, but, as we were more or less busy, I didn't care to have any trouble over it. I didn't want any time wasted over it; and I merely offered \$100, because I thought it was worth more to me than to have any trouble. Later, after I had consulted an attorney in the matter, and been to some expense, I made the offer of \$50. That is more than what our profits showed.

I gave our towel supply department instructions to use the chain connected to the basket and not connected to the bottom of the shelf there.

In giving that instruction, I had in mind the Reid patent, which had been shown to us, their chains were assembled that way.

CROSS EXAMINATION.

I made this change under the advisement that that was the infringement; that it should not be connected to the bottom of that post.

At the time that the negotiation for a settlement was in progress, we had somewhere between 80 and 100.

Q. Do you know how many you have installed today?

A. Probably 150; maybe 175. Now, you mean similar to this device?

Q. Yes.

A. I have less of them now than I had then.

By detaching the end of the chain, I mean not fastening it to the same lock that locks that what you call, or what the patent described there as, that assembling member. We merely fasten it to something underneath that, like a basket, or even the wall, and it gives us the same effect as it does fastened to your lock.

I made no change in the device except to fasten the loose end of the chain to the basket.

Our device never was exactly the same as the Brown device. We discontinued making the fastening to the lock, and we used the same device in every other respect as we had used it before. If we took the basket off that chain, we could still use it just as we did in the first instance, that is, if we put back the link in the lock.

J. A. CLANCY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a resident of Portland, and I have charge of the deliveries for the Crystal Laundry Company.

I first heard of the Brown patent during the month of November, about November 3d, 1914.

We were notified about the patent, and we consulted Mr. Geisler, and he took the matter under advisement, and told us afterwards to change our device so it would not infringe on the Brown-Meyer patent; so we changed the device to the bottom of the basket.

I kept account of the work done during the period from November 3 to December 1, 1914. The figures of Mr. Allen are correct as to what the profit would amount to.

I made the change as Mr. Allen explained here.

After that change was made, I visited these buildings and places where these devices were established about once a week, and noticed particularly that the bottom end of the chain was disconnected from the bottom end of the crooked head post. All the chains were connected with the bottom of the basket.

In supplying the customers with a towel-rack, none of them required any particular device.

We used this device here.

We adopted this device because we had to have some device to comply with the law that went into effect on July 28, 1914; so we took the easiest method, and made the simplest device, as you see that our device is not an exact copy of the other device.

Before that we used a device without a chain; we had the rod device, and fastened it to the wall, and the towels hung on the rod.

During the middle part of the summer—I couldn't say, either June or July, 1914—we connected a chain to it. I had no knowledge at that time about the Brown device at all.

CROSS EXAMINATION.

We changed from the solid rod to the chain because it was more efficient.

I first heard of the plaintiff's patent on November 3, 1914.

On that day our firm received a letter from the Brown-Meyer Company, or your office, that they had received their patent on November 3d.

This notice came through our office.

RALPH P. MEYER, recalled for the plaintiff.

DIRECT EXAMINATION.

I heard the testimony of Mr. Allen, that, in the negotiation made respecting this patent, the Brown-Meyer Company attempted to dictate a rate on towels; that is not a fact, according to my recollection.

No such attempt was made.

No rate proposed or discussed, though we talked about the rate that individual towels ought to have; but there was no attempt to dictate a rate in the settlement; absolutely none.

AMOS BURG, recalled for the defendants.

DIRECT EXAMINATION.

I was present at this meeting or conference between Mr. Allen, Mr. Brown and Mr. Meyer.

I remember hearing the discussion of a rate; we discussed it somewhat from a business standpoint. Mr. Brown or Mr. Meyer said something about, as I understood, that they wanted a certain price providing that they would let us use those towel-racks.

CROSS EXAMINATION.

It was a certain price for the use of the towels.

Although I couldn't say just what the conversation that we did have.

I mean to state that a rate agreement on towels was made a condition of making a settlement with us on this infringement question.

I understood it that way.

C. F. BROWN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am C. F. Brown, of the Brown-Meyer Company.

I heard the testimony given by Mr. Allen and Mr. Burg in regard to a conference at which I was present. To my recollection absolutely no towel rate was insisted upon as a condition precedent to making a settlement of this infringement.

CROSS EXAMINATION.

Nothing was said about the proper charges to make for towels.

Only as the laundrymen gathered together there, each one in his own interest, suggested what the price ought to be for a fair profit.

I couldn't say who made the suggestion as to what the rate should be. I don't know that there was any suggestion made as to what the rate should be. I don't remember whether there was or was not such a suggestion made.

REDIRECT EXAMINATION.

We did not demand any towel rate in order to settle.

*In the District Court of the United States for the
District of Oregon.*

Brown-Meyer Company, a Corporation,

(Title.)

OPINION OF TRIAL JUDGE.

Jos. L. Atkins for Plaintiff.

T. J. Geisler for Defendants.

Wolverton, District Judge:

The complainant is the owner of certain letters patent No. 1,115,895, issued to Charles F. Brown, November 3, 1914. It is only necessary to recite Claim 2, which is as follows:

"In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together."

The supporting member consists of a shelf for holding folded towels, the towels being provided with gromets in the corner. The assembling member consists of a standard, curved at the upper end, passing at its lower end through the shelf. To the assembling member is attached a flexible retaining member, commonly a chain, one end being fixedly attached at the top or curved end of the assembling member, and the other end detachably secured to the lower end of the assembling member beneath the shelf, by use of an ordinary padlock. In use, a towel is taken from the shelf, slipped over the curve

of the standard or assembling member, and applied and then dropped, but is retained by the sag of the retaining member. The drawings show the sag to extend into a basket which serves as a depository of the soiled towels until removed.

The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance.

Complainant sues, alleging infringement, and seeks an injunction and damages.

The primary question with which we have to deal is, does the defendants' device infringe plaintiff's patent?

The claims of the complainant's patent, it must be conceded, are subject to narrow construction, but so construed, I am convinced that the defendants are infringing.

It is the rule that to sustain the charge of infringement, the infringing device must be substantially identical with the one alleged to be infringed in the following particulars: First, in result attained; second, the means of attaining that result; and third, the manner in which the different parts operate and co-operate to produce the result. If the devices are substantially different in either of these respects, the charge of infringement is not sustained. *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed. 916, 923.

But it has also been determined that if the defendant uses the plaintiff's patented invention, he infringes, what-

ever else he may use or whatever else he may have added to it. *Johnson v. Root*, Fed. Cases 7411.

So it is that an infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. *Carter v. Baker*, Fed. Cases 2472; *May v. County of Fond du Lac*, 27 Fed. 691.

Nor is infringement avoided because some colorable variation or expedient merely impairs or narrows the function and usefulness of the patented device. *Whitely v. Fadner*, 73 Fed. 486.

Now, applying these principles, I am not persuaded that the simple means of attaching the chain or retaining member to the bottom of the basket on the inside instead of at the foot of the assembling member, varies the device to such an extent as to add a new discovery, or even an old element, to the combination. The complainant's device is so constructed that the basket may be used in connection with it as a depository for the soiled towels. The defendants' device simply makes the basket a depository and merely changes the place of attachment for the lower end of the chain or retaining member. As an illustration, in the *Reid* patent, the lower end of the chain is attached to a wall, and yet the patent to complainant's assignor was granted notwithstanding the prior patent of *Reid*. Now suppose that the defendant had used the *Reid* patent and simply detached the chain from the wall and attached it to the bottom of the basket and used the basket as a depository for the towels, could any one say that such a change constituted an added

discovery or new element to the Reid patent? The Reid retaining member could have been used by elongating the chain so as to drop the sag into a basket and thereby bring the basket into play as a depository as the complainant uses a basket.

Thus I cannot conceive that the detachment from the lower end of the assembling member in the Brown patent and attaching it to the bottom of the basket or depository is the adding of a new element or discovery to the defendants' device, and am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement.

The matter of treble recovery will be left for consideration on the accounting.

*In the District Court of the United States for the
District of Oregon.*

(Title)

No. 6719

INTERLOCUTORY DECREE FOR INJUNCTION AND ACCOUNTING.

At the November term of the District Court of the United States for the District of Oregon, held at the United States Court Room, in the City of Portland, on the first day of December, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

Present: The Honorable Charles E. Wolverton,
District Judge.

This cause coming on to be heard at the November term of the said Court, in the year of our Lord, One Thousand Nine Hundred and Fifteen, and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows:

FIRST. That said Letters Patent No. 1,115,895, granted and issued on the 3d day of November, 1914, to Brown-Meyer Company, assignee of Charles F. Brown, being the Letters Patent referred to in the Bill of Complaint herein, are good and valid as respects all the claims thereof.

SECOND. That the said Charles F. Brown was the first true and original inventor of the invention and improvement as described in the claims in said Letters Patent, and the specification annexed thereto.

THIRD. That Brown-Meyer Company, the complainant in said Bill, is the lawful owner of said Letters Patent.

FOURTH. That the defendants, Broadway Towel Supply Company and Amos Burg, have infringed upon the claims of said Letters Patent, and upon the exclusive rights of the complainant under the same.

FIFTH. That the complainant do recover of the defendants the profits, gains, and advantages which the said defendants have derived, received or made by reason of said Letters Patent, and that the complainant do recover all damages resulting from said infringement.

SIXTH. And it is hereby further ORDERED,

ADJUDGED and **DECREED** that it be referred to Wallace McCamant, Master in Chancery of this Court, his experience in such matters being found by the Court a sufficient reason for his designation, to ascertain and take, and state, and report to the Court on account of the gains, profits and advantages which said defendants have received, or which have arisen, or accrued to them, or either of them from the said exclusive rights of the said complainant, by the use of the said invention, and the damages which the complainant has suffered by said infringement, and to assess such damages, and to report thereon with all convenient speed; and the directors of the defendant corporation, officers, attorneys, clerks, servants and workmen are ordered, directed and required to attend before said Master from time to time as required and to produce before him such books, papers, vouchers and documents, and to submit to such oral examinations as the Master may require or direct.

SEVENTH. It is further **ORDERED, ADJUDGED AND DECREED** that a perpetual injunction issue out of and under the seal of this Court, directed to the said defendants, to-wit: Broadway Towel Supply Company and Amos Burg, their associates, directors, officers, attorneys, clerks, agents, servants and workmen, enjoining and restraining them, and each of them from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used, in any manner, any articles, devices, apparatus or machines, containing, embodying, or employing the said invention described in the claims of said Letters Patent, Pursuant to the prayer of the said Bill of

Complaint, or from infringing upon, or violating the said Letters Patent in any way whatsoever.

EIGHTH. That the complainant do recover of the defendants its costs and disbursements in this suit to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the Master's report.

CHARLES E. WOLVERTON,

Judge.

*In the District Court of the United States for the
District of Oregon.*

(Title)

No. 6719.

PETITION FOR LEAVE TO FILE SUPPLE-
MENTAL ANSWER AND TAKE
PROOFS THEREON.

TO THE HONORABLE, THE JUDGES OF
THE ABOVE NAMED DISTRICT COURT:

The petition of the Broadway Towel Supply Co., a co-partnership composed of Amos Burg, Charles Burg, and W. C. Smith, respectfully shows:

That this suit was brought to recover for the alleged infringement of letters patent of the United States granted Charles F. Brown November 3, 1914, No. 1,115,895, on an application filed by said Brown August 13, 1913.

That the defendants answered, denying that the said Brown was the first inventor of said invention, and also denying that they infringed the same, except inadvertently during the month of November, 1914, as by reference to defendants' Answer will more fully appear.

That when defendants' Answer was filed they had only such knowledge with respect to the state of the art as was disclosed by the patents issued in the art.

That as defendants have only just ascertained, when they filed their answer in this suit, there were pending in the United States Patent Office two applications for

letters patent on behalf of two other inventors, whose inventions were and are prior to the alleged invention of Brown described in the patent in suit, and one of said inventions apparently dominating all types of towel racks of the kind in question.

That, therefore, said prior inventions, and the letters patent issued and to be issued thereon, have a material bearing on all issues involved in this cause and tend to show:

First—That said Brown is not the first inventor of his alleged invention, as claimed in his alleged letters patent.

Second—That if said letters patent be upheld at all, the claims thereof must have a very strict construction placed thereon, and when so construed the device used by defendants after December 1, 1914, would not infringe in any event.

Third—That if said Brown's alleged invention, and the letters patent thereon granted, are valid, the alleged invention of said Brown is itself dominated by the invention of and the letters patent issued thereon to Jacques Rousso, dated October 19, 1915, and No. 1,157,046, and granted on an application filed January 12, 1912, thus long prior to the application of said Brown, which culminated in the patent in suit.

That said letters patent of Rousso controlled the use of any individual towel racks of the kind and type in question in this suit, and therefore said letters patent control also the particular towel racks used by the de-

fendants, and thus, though assuming that the device used by the defendants even during the period from November 1st to December 1, 1914, did infringe upon the patent in suit, such device of defendants would also, and to a much greater extent, be dominated by and tributary to said Rousso patent, and consequently defendants would have to settle with the latter too, which fact is very material in all phases of this cause, and particularly also on any accounting for profits alleged to be due complainant.

That defendants only just discovered the Rousso patent. That said patent not being issued at the time said Brown application for patent for his alleged invention was pending, said Rousso patent was not cited. That defendants have ordered a certified copy of said Rousso patent, and also of the file wrapper thereof.

That there was further filed in the United States Patent Office, prior to the issuance of the patent in suit, an application on behalf of Henry A. Ammann, for an improvement in Towel Racks, the filing date thereof being September 29, 1914, and the Serial No. 864,049. That said application on behalf of said Henry A. Ammann is still pending and no inspection thereof could be obtained by the public, and no knowledge thereof was possessed by the defendants until the same was recently called to their attention by their attorney, T. J. Geisler, in this case, and defendants were permitted an inspection of said application of Ammann. That from an inspection of said application of Ammann it is apparent that the latter invented a towel rack which embodied the combination claimed in the patent in suit.

That attached hereto, as Exhibit A, is a photograph of the towel rack invented by said Ammann.

That defendants verily believe that said Ammann invented his said towel rack prior to the alleged invention by said Brown purported to be covered by the patent in suit, and defendants are in possession of the facts which, if proven, would show that said Ammann was the prior inventor as aforesaid.

That defendants learned of the facts concerning said Ammann invention just recently, in the following manner: That there is pending in this Court a suit by the above named complainants, Brown-Meyer Co. against the Crystal Laundry Co., which suit was tried at the same time as the case against these defendants, and involves fundamentally the same issues. That after a decree was entered in said case against the Crystal Laundry Co., the latter, being informed of the Ammann towel rack, obtained the license from said Ammann to use his towel rack in its business, and purchased some of said racks from Ammann. That thereupon the complainants claimed that the Ammann towel rack which said Crystal Laundry Co. was using was also an infringement on the patent in suit. That thereupon said Crystal Laundry Co. immediately communicated said contention of complainants to Ammann, and said Ammann then informed the Crystal Laundry Co. that he himself invented his own wire towel rack prior to the alleged invention of said Brown of his improvement. That our Attorney in this cause is also the Attorney for said Crystal Laundry Co., and thus became apprised of said facts concerning the Ammann towel rack.

That immediately after defendants were informed of the matters relating to the Amman towel rack, they investigated such matters, and from such investigation believe that the claims of said Ammann, as to priority over said Brown, are fully substantiated by the record of his application, and the facts which defendants will be able to prove through said Ammann, and other witnesses.

That as above mentioned, said Ammann application has not yet been completed, but defendants, by permission of said Ammann, have ordered a certified copy of the file wrapper thereof for use in this cause.

That since the complainants claimed that the Ammann towel rack is an infringement on the patent in suit, because subsequent to the invention thereby protected, proof of the fact that the Ammann invention was prior to the Brown invention, covered by the patent in suit, would tend to show that the Brown invention was anticipated.

That proof of the facts relating to said invention of said Rousso and said Ammann will furthermore show that whatever said Brown did invent it is but a very small portion of any of the towel racks used by the defendants even during said period from November 1, 1914, to December 1, 1914, and was not infringed by any device used by defendants since December 1, 1914.

Therefore defendants pray for leave to file a supplemental answer herein, alleging the facts above narrated concerning said Rousso patent and said Ammann application, and the inventions thereby covered.

That the proposed supplemental answer of these defendants is hereto attached, duly verified, and defendants pray that the same may be filed in this cause.

Defendants further pray that they be permitted to prove the facts above averred, and by said proposed supplemental answer alleged, concerning said Roussio patent and said Ammann application, and the inventions thereby covered.

Defendants further pray that this cause be re-heard on said further proofs of defendants, after the same have been introduced.

And defendants further pray for such other and further relief in the premises as to the Court may seem meet.

Dated April 5, 1916.

BROADWAY TOWEL SUPPLY CO.,

By Amos Burg,

A Member of the Firm.

AMOS BURG,

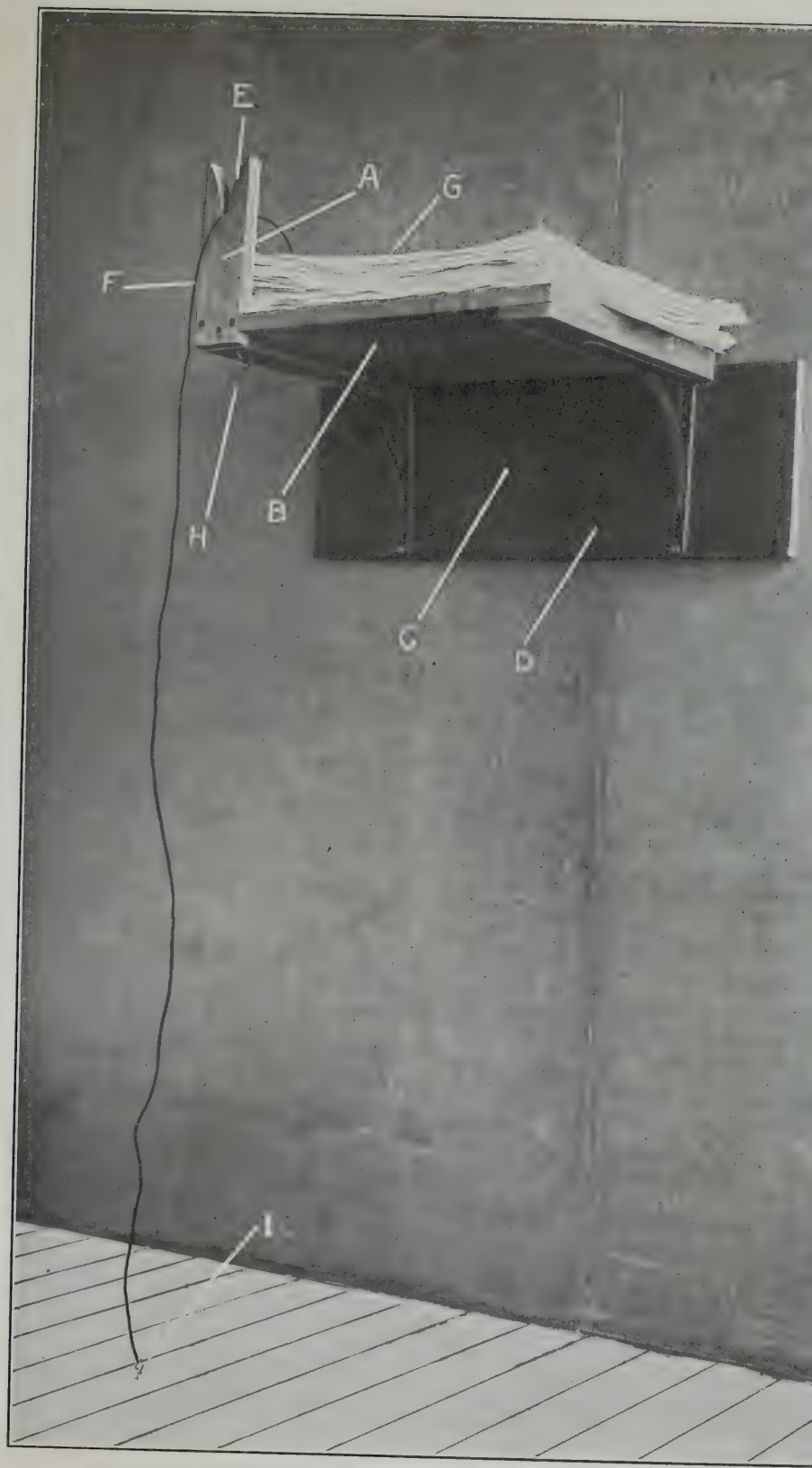
Defendants.

Here follows verification.

I, Theodore J. Geisler, of counsel for the above named defendants, hereby certify that I have read the foregoing petition, and I verily believe the same well founded in fact and law as therein represented, and that the defendants are entitled to the relief therein prayed for.

T. J. GEISLER,

Of Counsel for Defendants.



No. 6719.

(Title)

**PROPOSED SUPPLEMENTAL ANSWER.
TO THE HONORABLE, THE JUDGES OF
THE ABOVE NAMED DISTRICT COURT:**

And now comes the above named defendants, Broadway Towel Supply Company, a co-partnership, and Amos Burg, and by leave of Court make supplemental answer to the bill of complaint herein as follows:

That as set forth in the original answer, this suit was brought to recover for the alleged infringement of the alleged letters patent of the United States granted to Charles F. Brown November 3, 1914, No. 1,115,895, on an application filed by said Brown August 13, 1913.

That in the original answer defendants denied that said Brown was the original and first inventor of said invention, and also denied that they infringed the said letters patent purported to be granted therefor, except inadvertently during the month of November, 1914, all of which by reference to defendants' said answer will more fully appear.

That, as defendants have ascertained since the filing of their said original answer, there were pending in the United States Patent Office two applications for letters patent on behalf of two other inventors for improvement in Towel Racks, whose inventions were and are prior to the alleged invention of Brown purported to be patented

in the patent in suit. That one of such applications was filed by Jacques Rousso January 12, 1912, and matured in letters patent dated October 19, 1915, and No. 1,157,-046, and that the other of said applications was filed by Henry A. Ammann, of Spokane, Washington, on the 29th day of September, 1914, under Serial No. 864,059, and thus was pending when the patent in suit issued, and that said application of said Ammann is still pending in the United States Patent Office, but defendants, by permission of said Ammann, have had an inspection of his said application.

That defendants are further informed by said Henry A. Ammann; and verily believe, that the invention by him in his said application described was invented by him prior to the alleged invention by complainant's patentee, said Charles F. Brown, of the alleged improvement in Towel Racks which the patent in suit purports to cover.

And defendants further aver that they are now informed and verily believe that said Charles F. Brown, complainant's patentee, was not the original and first inventor or discoverer of the combination set forth in the claims in the patent in suit, or of any of the material or substantial parts of said combinations, or any other improvement in Towel Racks purported to be covered by the patent in suit, but that said combinations, and the material and substantial parts thereof, and said alleged improvement by said Brown was known in the prior state of the art as disclosed by the patent specified in the original answer of defendants, and as further and particularly disclosed by the patent to Jacques Rousso, the patent to Guy Reid, set forth in the original answer

in this suit, and by said application for patent of said Henry A. Ammann, of Spokane, Washington; and was furthermore known and used by said Ammann prior to the alleged invention thereof by said Brown; and that therefore the patent in suit always has been and still is wholly null and void.

And these defendants further aver that if there is any improvement in Towel Racks invented by said Brown and covered by said alleged patent in suit, such alleged improvement was and is of the most specific and limited character, especially in view of the matters herein set forth, and therefore must be construed accordingly, in order not to encroach upon the rights vested in prior inventors, and their assignees and licenses, and the general public at the time said Brown invented his alleged improvement, and which rights still are so vested. And furthermore, whatever improvements in towel racks may have been invented by said Brown, or which the patent in suit purports to cover, is itself dominated by the aforesaid patent of Jacques Rouso, since the issuance of the latter, and therefore, if defendants are to be held to account to the complainants herein, they should have their accountability determined and limited with due regard to said patent issued to said Jacques Rouso and the obligations of defendants thereunder.

WHEREFORE these defendants pray that they be permitted to make proof of the matters in this supplemental answer alleged; that they have the relief prayed for in their original answer, and also such other

and further relief in the premises as to the Court may seem meet and in accordance with equity.

BROADWAY TOWEL SUPPLY CO.,

By Amos Burg,

A Member of the Firm.

AMOS BURG,

Defendants.

T. J. GEISLER,

Solicitor and of Counsel for Defendants.

Here follows verification.

In the District Court of the United States for the District of Oregon.

(Title)

No. 6719.

**ORDER DENYING DEFENDANTS LEAVE
TO FILE PROPOSED SUPPLEMENTAL ANSWER.**

The petition of the above named defendants, verified April 4, 1916, praying for an order granting them leave, under rule 34 of the Equity Rules, to file a supplemental answer alleging certain facts claimed by defendants to be material to this cause, and set forth in said petition and the proposed supplemental answer therewith filed, and permitting defendants to prove the facts alleged by such proposed supplemental answer, and that defendants have also such other and further relief in the premises as to the court may seem just, coming on to be heard before the court at this time, complainants appearing by counsel but not having filed any affidavits or other pa-

pers in opposition to said petition; and thereupon, after hearing counsel for the respective parties, and upon consideration thereof, it was

ORDERED that said petition be and the same is hereby in all respects overruled and denied.

Dated April 17, 1916.

CHAS. E. WOLVERTON,
Judge.

In the District Court of the United States for the District of Oregon.

(Title)

No. 6719.

MASTER'S REPORT.

Filed Dec. 21, 1916.

The above entitled cause having been referred to me as Master by order made by the United States District Court for the District of Oregon, on the 19th day of February, 1916, with instructions to examine the record and the evidence now on file or thereafter taken, and ascertain, take, state and report to the Court an account of the gains, profits and advantages which defendants have received or which have arisen or accrued to them, or either of them from the said exclusive rights of the complainant by the use of the said invention, and the damages which the complainant has suffered by said infringement.

I BEG LEAVE TO REPORT.

That the respective parties appeared before me by their counsel, Joseph L. Atkins, counsel for complainant, and T. J. Geisler, counsel for defendants.

The testimony offered by the parties was taken before me and the same, and the exhibits referred to in the testimony are annexed hereto and returned into Court with this report.

The complainant duly waived any claim for profits and the issue to be passed upon by me is what damages have been sustained by the complainant by reason of the infringement by defendants of the letters patent numbered 1,115,895, granted and issued on the 3rd day of November, 1914, to complainant, assignee of Charles F. Brown.

It appears during the year 1913, and at all times since complainant and defendant Broadway Towel Supply Company, were, and now are engaged in the laundry business in the City of Portland and County of Multnomah, State of Oregon, and it was, and is a part of the laundry business as conducted by said parties to supply and furnish to customers, for use, individual towels owned by the parties at and for an agreed price per hundred towels.

The City of Portland in August, 1913, required individual towel service, as a condition of making a contract with complainant. An ordinance was passed by the City of Portland in July, 1914, making it an offense to furnish in a public building, a towel intended, or available for common use by more than one person, and not

being laundered after such use. These circumstances created a local demand for individual towels, and complainant about August, 1913, installed in the City Hall, Portland, Oregon, a towel rack designed to render the use of individual towels convenient, and protect the laundry company from losses by theft. Complainant continued to use this rack and the letters patent were issued to it November 3, 1914.

In the year 1913, defendants became familiar with the rack used by complainant, and itself constructed and installed one in all respects like it. This practice defendants continued until after the letters patent were issued to complainant. After the patent issued, defendants attempted by making some changes in construction, to create a towel rack that would not be covered by complainants patent. The District Court held the towel rack produced by the changes thus made by defendants was an infringement of the letters patent issued to complainant. Defendant in this hearing seeks to review the decision of the District Court, and insists the master should determine whether or not the changes were in fact an infringement, and also what portion of the towel rack is covered and protected by the letters patent. The Master believes, and holds the decision of the District Court is the law of the case and conclusive upon the Master, and the use of the towel rack constructed and used by Broadway Towel Supply Company, defendants, since November 3, 1914, and until February 28, 1916, is an infringement of the right of complainant, and the latter is entitled to recover therefor its damages without any attempt by the Master to segregate or apportion

the amount of such damages resulting from the use of any particular portion or element of the towel rack protected by the letters patent.

Whether the action of defendant in attempting to avoid infringement by the changes it made in the rack is an incident commonly found in infringement cases, is immaterial, since the validity of the changes has been adjudicated.

I.

The particular towel rack covered and protected by the letters patent was not manufactured and sold by either complainant or defendant, and therefore there is no account of profits made by defendants or lost by complainant.

II.

Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license.

III.

The evidence shows in actual practice the towel rack in question was a device to permit the ordinary use of individual towels and at the same time protect the laundry from losses by theft.

The necessity for such a towel rack arose when City ordinance, and the demands of customers required that instead of roller or other towels, individual towels must be supplied. Under the circumstances thus disclosed it became and was a substantial advantage to possess and install a rack that would accommodate users and pro-

fect the laundry owner. The owner could supply free individual towels without any rack and bear the loss sustained by theft of towels. The evidence shows such loss would be so great, no one could afford to carry on the business by furnishing free loose independent towels. The laundry owner was therefore confronted with the alternative of either supplying a satisfactory towel rack or retiring from the business of supplying towels for general use.

Complainant furnished and used its own rack. Defendants furnished and used the same kind of rack or one so similar the court found there was no substantial difference between it and that of complainant. Complainant and defendant at different times charged and received various prices for towels supplied. These prices ranged from 60 cents per hundred, the highest, to less than 25 cents, but it seems to be fairly established by the evidence that in a general way the price was made at 30 cents per hundred. At this price the profit received was about 25 per cent, or one quarter of the total price paid by customers.

During the time covered by the investigation, defendant Broadway Towel Supply Company, supplied 446,858 towels, and in so doing used the racks in question. Defendants secured a contract from Multnomah County, by underbidding complainant and using a towel rack identical with that of complainant in the performance of the contract. This incident happened before letters patent issued, but the arrangement continued after November 3, 1914, and until the service of the injunction in the present case.

The Broadway Towel Supply Company furnished under the circumstances already detailed the number of towels stated, viz., 446,858, and the total receipts therefor was thirteen Hundred Forty and 50/100 Dollars (\$1340.50). Of this amount the proof shows 25 per cent, or one-quarter was profit, or Three Hundred and Thirty-five Dollars (\$335).

Complainant claims a considerable amount of damages on account of a reduction in price from 50 cents per hundred to 30 cents per hundred. It does not appear to the Master that this reduction is shown by the testimony in the case to have been brought about entirely by the fact that the defendant Broadway Towel Supply Company after the patent was issued to complainant, nor does it appear from the testimony what proportion or amount of the reduction in price was occasioned after the patent was issued by defendant Broadway Towel Supply Company using a rack which was an infringement of said patent, and this claim is disallowed.

Complainant also claims damages to the amount of one-third of the loss of profits on 2,900,000 towels, the amount of complainant's business from November 3, 1914, to February 18, 1916, the defendant Broadway Towel Supply Company, being one of some three laundries engaged in the business at Portland and vicinity.

The Master for the reasons already stated in connection with the uncertainty of the proof as to all the causes for a price reduction and for the further reason that the evidence shows the actual amount of towels sup-

plied by defendant Broadway Towel Supply Company, for which it may be liable, this claim is disallowed.

I find that the Broadway Towel Supply Company at all the times it used the rack which was an infringement of the rights of the complainant, knew the rack which is now covered by the letters patent, was the property and design of the complainant, and deliberately and purposely used the same for its own purposes, and with the purpose and intent to benefit itself by such use and in total disregard of the rights of complainant, and I find the same facts as against the defendant Amos Burg.

From the foregoing facts I find as a conclusion of law, that the complainant is entitled to recover of defendants Broadway Towel Supply Company and Amos Burg, the sum of Three Hundred and Thirty-five Dollars (\$335.00) together with costs and disbursements, and recommend that the Court award triple damages.

JOHN B. CLELAND,

Master.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

**STIPULATED CONDENSED STATEMENT
OF TESTIMONY IN THIS CASE, ON AC-
COUNTING BEFORE MASTER AFTER
INTERLOCUTORY DECREE.**

Suit is for infringement of United States Letters Patent No. 1,115,897, issued on November 3, 1914, to plaintiff, as assignee of Charles F. Brown, on application filed August 13, 1913.

Accounting was had before John B. Cleland, Esq., a special master, at Portland, Oregon, beginning April 26, 1916; the parties appearing by the same counsel as on the trial of this cause.

It was stipulated that plaintiff was prepared and ready to supply all demands for individual towel service under the patent in the city of Portland which was or might have been made on it.

AMOS BURG, a defendant called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS:

I am one of the defendants in this case.

I am the manager of the defendant, Broadway Towel Supply Company, now a corporation, incorporated since this suit was brought.

I have made an examination of the records to determine the number of towels furnished to customers on the racks held by the Court to be covered by the patent in suit from the date of the patent until the injunction was served in this case, and furnish a statement of the same.

MR. ATKINS: Statement headed "Account of Broadway Towel Supply Co." referred to by the witness, offered in evidence, and the stenographer is requested to mark it "Complainant's Exhibit AA."

Statement marked COMPLAINANT'S EXHIBIT AA.

ACCOUNT OF BROADWAY TOWEL SUPPLY CO.

Ainsworth Bldg.@	.30c	32,928
Behnke Walker .....	.30c	35,040
Caswell .....	.30c	16,890
Court House .....	.28c	225,832
Equitable .....	.35c	17,145
Hamilton Pool Hall ...	.30c	575
Henry Bldg. ....	.35c for first	
	1000 then 30c	34,726
Lowengart .....	.30c	2,500
Moose Lodge .....	.30c	15,700
Powers & Anderson....	.30c	9,900
Sherlock Bldg. ....	.35c for first	
	1000 then 30c	84,720
Van Schuyvers .....	.30c	10,850
		<hr/> 486,858
Deduction for Court House.....		40,000
		<hr/>
Actual number		446,858

Since February 28, 1916, we have two different towel racks. One of them is the Rouso patent and the other one is the Michaelson—Ed Michaelson's company is at Chicago.

Those are the only ones which we have used since February 28, 1916, to the best of my knowledge.

Mr. Smith is the one that has charge of that and he tells me that he has not.

Referring to Complainant's Exhibit AA, the rate per hundred towels to different customers varies. The cause for such variation in price is, the more towels a person uses the better prices, as a rule, he demands.

Our largest customer is the Court House. They get a rate of twenty-eight cents for that reason. Thirty cents per hundred is the prevailing rate, and we figure up or down from that as a basis.

Our profit per hundred on towels supplied on the racks in question I can only approximate. It may run three per cent net.

The business of the Broadway Towel Supply Company is an independent business, but we have no separate plant or establishment. We have our work done at the State Laundry. We pay the State Laundry eighteen cents a hundred for laundering towels. That includes only laundering. It does not include delivery.

I am superintendent of the State Laundry.

The State Laundry Company is a corporation. I am a stockholder in that corporation also.

And I am a stockholder in the Broadway Towel Supply Co. I am a director and the present of the Broadway Towel Supply Co.

I am inside superintendent of State Laundry.

I hold no office in the State Laundry Co.

The capital stock of the State Laundry Co. is twenty-five thousand, I think. I own forty-two shares and a half, I think.

The capital stock of the Broadway Towel Supply Co. is Five Thousand, but only twenty-six hundred taken out. I own nineteen shares, at one hundred dollars each. Witness on recall testified that he had only \$500.00 invested in the Broadway Towel Supply Co., and upon cross examination that the said company is in effect the individual towel distributing department of the State Laundry.

The rate of eighteen cents a hundred for the laundering of our towels is arrived at by agreement. The agreement was made by Mr. Van Zante, the manager, and myself. I made no effort at the time of fixing that rate to determine whether I could get a cheaper rate from another laundry company. At the same time it is a rate that is as reasonable as there is any work done of that nature in the city. If a cheaper rate were available, it would be business to give the laundering of individual towels to others.

The first form of individual rack used by us in this individual towel business was a rack substantially like the Brown rack.

Mr. Smith was responsible for the adoption of the original rack, in so far as he came in and told me that he thought he could fix up a rack that would be satisfactory, I said "all right," not knowing anything about the patent proposition.

I did not see the rack which was first installed in the Court House before I took the contract to supply the Court House.

We pay eighteen cents a hundred for the laundering of the individual towels, and any profit we make had to come out of the remaining twelve cents of the thirty cents. The expenses deducted from that twelve cents, as a basis in arriving at our profit, which I have stated approximately to be three per cent, is delivery and depreciation in the towels, stationery and other items. Cannot state what the expenses are but will look them up and furnish them.

I am acquainted with the suit brought by the complainants in this case against the Crystal Laundry Co. and Percy G. Allen. I have no agreement with them in regard to that litigation, except that we should go together, kind of, on account of expense that may occur; just a wordly agreement between us that we would stand our proportion of the expenses.

I am aware that notice of appeal has been filed in that suit. I am the surety on the appeal bond.

The verbal agreement which I have mentioned does not extend to sharing the expense of that appeal. The proportion of expense which we were to bear was up to the date the injunction was served. We are not obli-

gated to pay any part of the expense since that injunction was served.

CROSS EXAMINATION BY MR. GEISLER.

This agreement entered into between the Broadway Towel Supply Co. and the State Laundry Co. by which the rate of eighteen cents per hundred was fixed for washing and ironing the towels was in June, 1914, I think.

* * * * *

AMOS BURG, called as a witness by the defendant, having been previously sworn, testified as follows:
DIRECT EXAMINATION BY MR. GEISLER.

MR. ATKINS: Are you ready with your statement, Mr. Burg?

MR. GEISLER: To get that I will ask the witness some questions, so I will get it in the form of a record.

MR. ATKINS: What questions are those?

MR. GEISLER: So as to get it down, we will make the statement right in front of the Master and the stenographer can take it down.

MR. ATKINS: You mean to say that you want to call him as your own witness?

MR. GEISLER: For the purpose of this statement, yes, sure.

MR. ATKINS: I understood he was to continue his direct examination.

MR. GEISLER: Well, you asked for certain in-

formation and I am going to help him make up a statement right in the presence of the Master and yourself.

MR. ATKINS: Have him sworn as your witness.

MR. GEISLER: He is sworn.

MR. ATKINS: I mean, have him sworn as your witness in this matter.

MR. GEISLER: And you can cross examine.

We employ 7700 towels in our service, approximately. They cost us about five cents, so that would make the cost of those towels \$385.00; figuring at thirty-three and a third per cent depreciation would make \$128.33, or at the rate of \$1.66 per hundred depreciation. Of course that is all a matter of computation.

Upon cross examination witness stated he has no special knowledge of the records of his company. Keeps no separate accounts of the towels used, as involved in this suit. Does not know how many horses and wagons it would take to handle the towel business of the patent in suit. Defendant corporation has its quarters in the State Laundry. Amount of expense of individual towel business involved in suit is just an estimate. Estimates an expense of \$15.00 per month for upkeep of two wagons, but this is just guess work.

W. C. H. SMITH, a witness called on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS.

I am of lawful age.

I am a stockholder of the Broadway Towel Supply Company, also acting as secretary.

My duties are, attending to the outside work of the route and towel business; taking care of the amount of towels delivered and the amount of towels that are brought in and a correct count of them.

I am acquainted with Complainant's Exhibit AA.

We were using less than thirty of the individual towelracks held by the Court to be included in the patent in suit, when the injunction was served in this case.

I got them made by a carpenter, and never had more than thirty.

I ordered them at different times. I had a carpenter named Will Steel make them, and Mr. J. Walsh is the man who made the rod and chains.

There was an individual towel rack used in the Court House before I put one in. I saw it before I adopted ours, and made ours similar to it. At the time I saw that rack there, there was no mark of patent applied for on it, I had looked it all over before I ever made them.

The number of towels which the Broadway Towel Supply Co. dispensed to its customers in the period of November 1st to December 1st, 1914, was 29,176.

RALPH B. MEYER, called as a witness on behalf of complainant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS.

I am the Meyer of the Brown-Meyer Company, the complainant in this case.

The infringements in the city of Portland of the patent in suit, so far as I know, are made by the Crystal

Laundry and the Broadway Towel Supply, and the Palace Laundry Company.

With the exception of these three companies, there would be no infringement in Portland of the patent in suit, I believe.

Our company made a profit of 25% in the individual towel service supply under the patent in suit.

Our company commenced the individual towel service about July or August, 1913. The occasion for making use of this device in question was an ordinance passed by the City of Portland to discontinue the common use of a roller towel.

We installed this service in the Court House in Portland. I think it was in 1913.

We continued to supply that service at the Court House for nearly a year and a half.

The occasion of discontinuing the service was the cutting of the price by the Broadway Towel Supply.

The price originally started on, I think, was sixty cents, and then the price was voluntarily lowered by us because they didn't know what the amount of usage they were going to have, and when we saw the towel expense was so high we voluntarily cut the price and it got down to a sort of a uniform price of thirty cents. The price was cut down below that, and we lost the contract on the cutting of the price.

The Broadway Towel Supply took the contract away from us before November 1, 1914.

The rack used by the Broadway Towel Supply Co.

when they took this contract away from us was the identical rack that we used.

The Broadway Towel Supply Company appropriated our rack and cut the price in order to get the business from the Court House.

The ordinance of the City of Portland to which I have referred required the use of individual towels in place of one towel for common use.

We adopted a rack for holding the individual towels assembled instead of using loose individual towels, to keep them from being stolen. Without some means of securing them against theft I think the public would have stolen fifty per cent of them, or more. That would have been practically prohibitive of the business.

We don't make any charge for this towel rack which we supply with our individual towels.

Our customers do not demand as a condition for our delivering our individual towels that we supply them with any particular kind of fixture. The towel fixture is exclusively for our own benefit in this, that it prevents the carrying away of towels. It would be just as handy to have a towel loose as to have it on a string, the customers are interested simply in the delivery of clean individual towels and the price which you are going to charge for them. As a general rule we have been asked to state what kind of rack we had for the towels.

I am not selling towel racks.

I am prepared to sell towel racks upon demand.

As a matter of fact, I offered to supply the defendant in this case with the towel racks.

These towel racks that we supply for individual towel service are such as comply with the ordinance of the City of Portland. And I found them generally acceptable to customers to whom we supply them.

Complainant's Exhibit BB showed statement of complainant's individual towel service business, including the following:

Number of towels in service....	18,000	
Cost at 4c each.....		\$720.00
33 1/3% yearly depreciation.....		240.00
		<hr/>
Depreciation per week		\$4.60
No. of holder racks in service..	181	
Cost at \$2.00 each		362.00
10% yearly depreciation		36.00
		<hr/>
Depreciation per week .....		.70

The remainder of this statement is omitted because immaterial to the question to be presented on appeal.

GARFIELD W. HAWN, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GEISLER.

I am superintendent of drivers and assistant manager of the outside of our laundry—Portland Laundry Company.

We use towel fixtures ourselves. We make no charge to our customers.

The competition in general with respect to individual towels is not based upon any particular fixture, only

upon the rental price of towels. The fixture is at the option of the man that rents them; it is for his own protection to prevent the loss of towels—some device of locking them in place.

Now we figure on our stock of towels investment thirty per cent depreciation—that would amount to in cents three cents per hundred towels.

On cross examination witness stated that 33% depreciation is on towel stock together with depreciation on overhead, that is, machinery, horses and wagons.

W. C. H. SMITH, recalled as a witness in behalf of the defendants, having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. GEISLER.

Competition fixes price of towels. The fixture don't amount to anything, all they want is the towels, I have towels out just laying on the shelf, without any fastenings.

The object of using the fixture is to save us from losing towels, we lost quite a few towels and you have to have some kind of a way to keep them.

There are quite a number of different kinds of fixtures in use in the city of Portland at the present time.

We use a kind of red mahogany case, the towels are fastened to a rod and a chain and lock inside of a case.

We do not use any fixture now which embodies a chain and a shelf.

At the present time I am just using a shelf and the towels are loose on that; I also have some cases, as I stated, those cabinet cases.

During the month of November, 1914, I was using a shelf with a rod, fastened with a lock, similar to the device described in the Brown patent.

On the first of December, 1914, I discontinued the chain from the lock and had fastened to the basket with a ring inside of the wire basket. I believed that in making that change I was no longer infringing on the Brown patent.

CROSS EXAMINATION.

Questions by Mr. Atkins:

Q. What do horse shoes cost around?

A. What is that?

Q. What do the horse shoes cost around?

A. From four and a half to five dollars.

Q. The shoes?

A. Yes, sir, rubber pads.

Q. Do you use rubber pads exclusively?

A. What is that?

Q. Do you use rubber pads all the time.

A. Yes sir.

Q. Nothing but rubber pads?

A. Yes sir.

Q. Do you have the keeping of these accounts for repairs of wagons?

A. No, I get the bills, and sometimes I pay cash, and then most of the bills I turn over to Mr. Burg. I really take care of the business on the outside.

Q. Have you any account of expenditures for wagon upkeep during the first six months of 1915?

A. Have I?

Q. Yes.

A. No, Mr.— I don't know, we have had bills every month, but Mr. Burg keeps those bills; I don't know whether he keeps them, sometimes we keep them and sometimes we don't keep them, but I could bring in a bill to let you—

Q. You keep no account of that?

A. No, sir, not me. I have the work done and have it charged up.

Q. And you have no record of that that would show any such expenditure of fifteen dollars a month for wagon repair?

A. Well, that is usually the price, for any person with any sense should know that keeping a wagon for a year, you have to repair a wagon.

Q. I am asking about facts, I am not asking for—

A. I am just telling you that.

Q. There is no use of filling this record with a lot of talk what might be done, we want to know what has been done.

A. You are asking the questions of me.

Q. I am asking the question as to what money has been paid out; if you don't know, answer it and put it that way.

A. I told you it averaged fifteen dollars a month.

Q. Have you any record to show that you paid out that much money?

A. Have I got any record?

Q. Yes.

A. No.

Q. You don't know—you swear that you paid out fifteen dollars a month?

A. I didn't say I would swear.

Q. What?

A. I didn't say I would swear to it.

Q. No, you are just talking.

A. Yes.

All exhibits introduced before the Court on the trial were also considered before the Master.

It was stipulated that after December 1, 1914, to date of hearing before Master, the device used by defendant laundry company was used only by having the lower end of the chain hanging down and fastened to the bottom of the basket, and that the lower end of the chain was not fastened to the lower end of the assembling member, referring to that part which in plaintiff's patent is designated by 4.

Defendants' counsel proposed to show by the letters patent granted to Jacques Rouso October 19, 1915, and numbered 1,157,046, a duly certified copy of which letters patent were offered as an exhibit, that such patent shows the prior state of the art bearing directly on towel cabinets or fixtures of the kind here in controversy, and that the Rouso patent dominates the use of all fixtures of that kind, and all users of fixtures of that kind

are on the record of this patent liable to Rousso for infringement; and that said patent would also show what it is that the inventor of the patent in suit did invent, in order that the Master may, with such evidence before him, arrive at proper deductions for determining what, if anything, should be paid by the defendants to the plaintiff in this suit.

Plaintiff's counsel objected to the introduction of the patent as showing an alleged prior state of the art for the reason that the patent is subsequent to the Brown patent in suit, and that it issued prior to the trial of this case before Judge Wolverton, who upon motion denied consideration of this patent which defendants' counsel offered.

Defendants' counsel further offered a certified copy of the file wrapper of the application made by said Jacques Rousso, showing that the application for said Rousso's patent was filed on January 12, 1912, and thus over a year prior to the application for patent on behalf of Brown, the inventor of the alleged patent in suit.

Plaintiff's counsel objected to the introduction of the last offer upon the same ground as the previous offer.

Defendants' counsel further offered to show by the testimony of the witness William C. Schmitt, a mechanical and civil engineer and expert in patent matters, competent to read patent documents, that he has examined the Rousso patent referred to and that such patent is basic on the particular kind of fixture involved,

and controls all fixtures of the kind here in consideration and therefore all fixtures of that kind which are used would be tributary also to the Rousso patent.

Plaintiff's counsel objected to the testimony of the witness along the line indicated upon the ground that it is incompetent. Questions of infringement are matters for the Court and it has been uniformly held that they are not proper matters for expert testimony.

Defendants' counsel stated that the evidence offered was not with regard to defining this patent but merely defining the mechanical construction of the device thereby patented and explaining the bearing of such device in the patent granted thereon, for the purpose of facilitating and enabling the Master to make correct deductions in the premises in the giving of his judgment in this case.

THE MASTER, after hearing the argument of counsel, sustained the objections of plaintiff.

Defendants' counsel further called the special attention of the Master to the fact that the object in offering said Rousso patent and showing that upon the record thereof it is superior to and prior to the patent here in suit, is that the defendants have an existing obligation under such patent to the owners thereof and such objection should be taken into account in making any award, if any to be made, to the plaintiff as against the defendants in this case.

Plaintiff's counsel stated that it is so understood in the previous presentation of the points, and no further objection is necessary.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

It is hereby stipulated that the foregoing is a true, complete and properly prepared statement of the testimony and proceedings before the Master on accounting in the above entitled cause, and that the same may be approved by the Court accordingly.

Dated March 24, 1917.

JOSEPH L. ATKINS,
of Counsel for Plaintiff-Appellee.

T. J. GEISLER,
of Counsel for Defendants-Appellants.

The foregoing condensed statement of the testimony and proceedings before the Master on accounting in this cause is hereby approved, on the stipulation of the parties.

Dated March 27, 1917.

CHARLES E. WOLVERTON,
District Judge.

(Title)

No. 6719.

**EXCEPTIONS OF DEFENDANT BROAD-
WAY TOWEL SUPPLY CO. TO
MASTER'S REPORT.**

The defendants Broadway Towel Supply Company, a corporation, and Amos Burg, hereby excepts to the report of the Master on accounting filed December 21, 1916, herein, in the following particulars:

I.

(a) To the finding as a conclusion of law in said Report (page 67, last paragraph) that the complainant is entitled to recover of this defendant the sum of \$335.00, for the reason that said finding is erroneous since unsupported by any finding of fact or evidence in the case.

(b) Said finding is also erroneous for the reason that the evidence shows, as reported by the Master (page 64, I, II of his report) that: "The particular towel rack covered and protected by the letters patent was not manufactured or sold by either complaint or defendant, and therefore there is no account of the profits made by defendant, or loss by complainant. Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license." That the only damage which the complainant claims in this case is the bene-

fits derived by defendants in this, that the towel rack used by defendant, and adjudged to be covered by complainant's patent, protected this defendant corporation against loss of towels by theft. That said sum of \$335.00 awarded by the Master to complainant, however, was the entire profit by this defendant on all its towels in service (Master's report, page 66, lines 1 to 7). Therefore, in awarding said \$335.00 the Master obviously assumed that this defendant would have lost so many towels if it had not used said towel rack and that it would have lost all its profits, which assumption is wholly unsupported by any evidence. That the evidence shows (Masters' report ib.) that this defendant had 446,858 towels in service. That the only testimony as to the probable amount of towels which defendant might have lost if he had not used said towel rack was the testimony of Meyers, of complainant corporation, who testified (Testimony before Master, page 77) :

"Q. What would have been the result had you used individual towels without some means of securing them against theft?"

"A. Oh, I think they would have stolen 50% or more." Which, as evident, was a mere matter of opinion.

The said 446,858 towels used by this defendant in its towel service to customers represented a total investment of \$385.00 (Testimony before Master, p. 74), and if defendant had lost half of their towels they would have sustained a loss of one-half of said \$385, and thus only \$192.50. 77

(c) Said finding is further erroneous because said \$335.00 awarded complainant is greatly in excess of any saving of this defendant due to the patented features of said towel rack, for the towel rack used by this defendant represents in its greatest part merely the towel rack patented to Guy Reid July 15, 1913, No. 1,067,622 (transcript of testimony on trial, pages 21 and 29) on an application filed July 18, 1912; which latter patent, therefore, is prior to complainant's patent, and in such prior patent the complainant had no greater interest or right than this defendant or the general public. That though the claims of the complainant's patent are founded upon a combination, that does not change the character of the invention if in fact it is a mere improvement in some particular of said prior Reid towel rack. Nevertheless the Master refused to examine into the character of complainant's patent, or to ascertain what portion of the towel rack used by this defendant said patent covered and protected, and what portions it did not protect. (Master's report, pages 63, 64). And further refused to segregate and apportion the alleged savings of the defendant, due to the use of said towel rack relatively to the features of the latter protected by said patent. All of which proceedings of the Master were contrary to law and equity. That it was the duty of complainant to show, and the Master to ascertain, the character of said patented invention, and the Master should have confined his award to a fair compensation to complainant for the actual infringement perpetrated by defendant upon said patent, and if the complainant did not carry its burden, and the evidence introduced did

not permit the Master to arrive at a proper apportionment, then he should have awarded only nominal damages.

(d) Said finding is further erroneous and inequitable because the complainant's patent apparently is itself dominated by the letters patent of the United States issued to Jacques Roussio October 19, 1915, No. 1,157,046, on an application filed January 12, 1912, and this defendant sought to prove said fact by proper and sufficient evidence, also the obligation of this defendant under the latter patent, but complainant objected to such proof, and the Master erroneously sustained such objection and refused to hear any proof of said matters, as appears in the Transcript of Testimony before Master, pages ~~100~~⁸² to ~~122~~⁸⁴. In consequence this defendant, contrary to the principles of equity, may be subjected to a double liability, namely, the two independent inventors and patentees, for the taking of the same thing, instead of compensating each patentee only proportionately to his interest in such thing. And, furthermore, said patent to Roussio bore directly on the prior state of the art, and proof of said patent should have been admitted in order to enable the Master correctly and equitably to determine what it was that was secured to the complainant by the patent in suit.

II.

This defendant also excepts to the finding of the Master in his report (page 67, last paragraph) to the effect that the circumstances of the alleged infringement by this defendant warrants the award of triple damages,

also to the recommendation of the Master that the Court so increased the damages awarded by the Master to the complainant, or so increase any damages which the complainant may be entitled to recover in this suit, because said finding and recommendation are erroneously and inequitable, for said finding and recommendation are:

(1) Not based upon any evidence showing that these defendants did more than defend their supposed rights, and in so doing compelled complainant to litigate and establish the legal character and scope of its patent.

(2) Said finding and recommendation of the Master are contrary to law, and particularly to the principles and practise of a court of equity, and tend to establish the inequitable rule that any one contending with the patentee as to the construction to be placed on his patent does so at his peril and may have punitive damages visited on him for refusing to accept, in the first instance, the construction placed by the patentee on his own patent.

III.

These defendants hereby further except to the finding and award by the Master of any other than nominal damages to the complainant, for the reason that the evidence does not show in what sum, if any, the complainant sustained any actual damage by reason of any infringement by this defendant upon the patent in suit.

T. J. GEISLER,

Solicitor for Broadway Towel Supply Company.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

**ORDER OVERRULING EXCEPTIONS I AND
III AND SUSTAINING EXCEPTION II.**

The exceptions of defendant, Broadway Towel Supply Company to the report of the Master on accounting, which report was filed December 21, 1916, having come on for hearing, T. J. Geisler appearing of counsel for said defendant, and Joseph L. Atkins appearing as counsel for complainant, it is, upon consideration

ORDERED, ADJUDGED AND DECREED that exceptions I and III be and they hereby are overruled, and that exception II, concerning the recommendation of the Master that the damages found by the latter be trebled by the court, be and the same is sustained.

CHAS. E. WOLVERTON,
Judge.

Dated January 25, 1917.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

FINAL DECREE.

Entered Januuary 22, 1917.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was **ORDERED, ADJUDGED AND DECREED** as follows, viz.: That said defendants pay to the said plaintiff the sum of Three Hundred and Thirty-five (\$335.00) Dollars, with interest from the date of the Master's report.

IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff be allowed its costs and disbursements of said suit to be taxed, and that this plaintiff have execution for such costs, and the sums above decreed, to be paid to said plaintiff.

CHAS. E. WOLVERTON,

Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title.)

The above named defendants, conceiving themselves aggrieved by the findings and conclusions of the Court in the above named case, and the final decree thereon entered Jan. 22, 1917, hereby appeal from said final decree, and all interlocutory proceedings, to the United States

Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed, and that a transcript of the records and proceedings of said District Court, on which said final decree is founded, may be sent, duly authenticated, to said Circuit Court of Appeals.

Dated March 22, 1917.

BROADWAY TOWEL SUPPLY CO.,

By Amos Burg, President,

AMOS BURG,

Defendants.

T. J. GEISLER,

Of Counsel for Defendants.

And now it is ORDERED that the appeal above prayed for be allowed, and the defendants asking for a stay of further proceedings until such appeal shall be heard, it is further

ORDERED that upon the defendants filing a bond, with approved surety, in the sum of One Thousand Dollars, such stay be and the same is hereby granted.

CHAS. E. WOLVERTON,

District Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS,
that we, Broadway Towel Supply Company, a corporation, and Amos Burg, both of Portland, Oregon, as prin-

cipals, and Percy G. Allen, of Portland, Oregon, as surety, are held and firmly bound unto the above named plaintiff in the sum of One Thousand Dollars, to be paid to the plaintiff, or its legal representatives, executors or administrators, and to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated March 22, 1917.

WHEREAS, the above named defendants have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the final decree and preceding proceedings by the District Court of the United States for the District of Oregon in the above entitled cause:

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiffs shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

BROADWAY TOWEL SUPPLY CO.,

By Amos Burg, President,

AMOS BURG,

PERCY G. ALLEN, Surety.

Signed, sealed and delivered in presence of:

Cecil Long.

United States of America,
District of Oregon—ss.

I, Percy G. Allen, of Portland, Oregon, being duly sworn, depose and say that I am the surety named in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of One Thousand Dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

PERCY G. ALLEN.

Subscribed and sworn to before me this 22nd day of March, 1917.

CECIL LONG,

(L. S.)

Notary Public for Oregon.

My commission expires Dec. 21, 1920.

Endorsed. Approved March 27, 1917.

CHAS. E. WOLVERTON,

District Judge.

ASSIGNMENTS OF ERROR.

The above named defendants, having appealed to the United States Circuit Court of Appeals for the Ninth District from the final decree entered in the above named cause, do hereby assign the following as the errors committed therein, to-wit:

I.

In finding that the towel rack used by defendants from and after December 1, 1914, to date of trial of this cause was not substantially different from the device claimed in the patent in suit, and that defendants' said device is an infringement of the device claimed in the patent in suit.

II.

In giving to the claims of the patent in suit a broader interpretation than warranted on the face thereof, or permitted by the prior state of the art.

III.

In finding that the device used by the defendants from December 1, 1914, is an infringement of the invention claimed in the patent in suit, because such finding is contrary to the principle and spirit of the patented invention in question, and also contrary to the law governing patents for combinations.

IV.

In finding that the device used by defendants from December 1, 1914, although merely an obvious modification of the patented invention of Reid, of record, which is prior to the patent in suit, nevertheless is an infringement of the patent in suit, for such finding disregards the rights vested in the general public prior to the issuance of the patent in suit.

V.

In finding that in order for the Court to hold that the device used by defendants from December 1, 1914, is not an infringement of the device claimed in the patent in suit, because substantially like the prior Reid patent of record, it must appear that the said defendants' device had added to it a new element or discovery, and without such defendants' device is merely colorable, and without such patentable variation as will avoid infringement.

VI.

In finding that there was substantial identity between the device claimed, and secured, by the patent in suit and the device used by defendants from December 1, 1914, with respect: (first) to the result attained, (second) the means of attaining that result, and (third) the manner in which the different parts operate and co-operate to produce that result; and in not finding that there was a substantial difference in said two devices in these respects.

VII.

In the entry of the interlocutory decree in this cause, because in prejudice of the substantial rights and equities of the deefndants in the premises.

VIII.

In denying the petition of defendants for relief to file, under equity rule 34, a supplemental answer alleging material facts of which they were ignorant at the time of their original answer, to-wit: setting forth patents of the United States granted for inventions prior to that of the patentee in suit, and bearing directly on the invention claimed in the latter patent with respect to the validity and scope thereof, and also bearing on the obligation of defendants under the patents of said prior inventors, which obligations defendants desired to be taken into account on their accounting herein.

~~IX.~~

~~In the entry of the supplemental interlocutory decree because in prejudice of the substantial rights and equities of the defendants in the premises.~~

~~X.~~

~~In the refusal to vacate said supplemental decree.~~

XI.

In overruling the defendants' exception I to the report of the Master on accounting.

XII.

In overruling the defendants' exception III to the report of the Master on accounting.

XIII.

In affirming the report of the Master, awarding the sum of \$335.00 against the defendants because such award is excessive, not supported by, and contrary to, the facts of the case.

XIV.

In awarding any other than a nominal sum against defendants, because the evidence does not show what, if any, actual damages the plaintiff sustained by any alleged infringement.

XV.

In the entry of the final decree in this cause because in prejudice of the substantial rights and equities of the defendants in the premises.

Dated March 23d, 1917.

T. J. GEISLER,

Solicitor and of Counsel for Defendants-Appellants.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

The parties hereby stipulate to the following precipe, indicating those portions of the record to be incorporated in the transcript on appeal in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

Bill of Complaint, omitting verification.

Answer, omitting verification.

Condensed statement of testimony given on trial of cause, as prepared and stipulated by the parties in the companion equity case No. 6718, entitled "Brown-Meyer Co. Plaintiff vs. Crystal Laundry Co., et al. Defendants."

Opinion of Trial Court.

Interlocutory decree, entered January 31, 1916.

Petition for leave to file supplemental answer, omitting verification.

Proposed supplemental answer, omitting verification.

Condensed statement of the testimony on accounting before Master, as stipulated by the parties.

Master's report.

Exceptions of defendants to Master's report.

Order of Court on exceptions.

Final decree entered January 22, 1917.

Petition for an order allowing appeal.

Bond on appeal.

Assignments of error.

Citation on appeal.

Dated March 24, 1917.

JOSEPH L. ATKINS,
Counsel for Plaintiff-Appellee.

T. J. GEISLER,
Counsel for Defendants-Appellants.

CITATION ON APPEAL.

No. 6719.

United States of America,
District of Oregon,—ss.

To Brown-Meyer Company, a corporation, Greeting:

Whereas, Broadway Towel Supply Company, a corporation and Amos Burg have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 27th day of March, in the year of our Lord, one thousand, nine hundred and seventeen.

CHAS. E. WOLVERTON,

Judge.

Due service of the within citation is hereby admitted this 27th day of March, 1917.

JOSEPH L. ATKINS,

of Counsel for Brown-Meyers Co.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title)

STIPULATION.

It is hereby stipulated that the foregoing printed transcript is a true copy of the entire record in the above entitled case on appeal and that the same may be certified to as such by the Clerk of said District Court without comparison.

It is further stipulated that printed copies of all patents and writings introduced in evidence by either party, but not placed in the printed transcript, may be furnished to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and by him placed as an appendix in the printed copies of the transcript; and that the original models introduced as exhibits by either party at the trial of this cause in the District Court shall be sent by the Clerk of the latter Court to the Marshal of said Circuit Court of Appeals pursuant to rule 34 of the latter Court.

Dated March 31, 1917.

JOSEPH L. ATKINS,

Of Counsel for Plaintiff, Appellee.

T. J. GEISLER,

Of Counsel for Defendants-Appellants.

United States of America,
District of Oregon—ss.

No. 6719.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed transcript of record on appeal in the case in which the Brown-Meyer Company, a corporation, is plaintiff and appellee and the Broadway Towel Supply Company, a corporation, and Amos Burg are defendants and appellants, is a true and complete transcript of the record and proceedings had in said cause in said Court. This certificate is made pursuant to the stipulation of the parties filed in said cause, without comparison thereof with the original record,

In Testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Portland, in said District, this 5th day of April, 1917.

G. H. MARSH,
Clerk.

Seal

APPENDIX OF DOCUMENTARY EVIDENCE

Containing as Follows:

Patent in suit granted to Charles F. Brown, November 3, 1914, No. 1,115,895, on application filed August 13, 1913, being Plaintiff's Exhibit A. See Record, page 66

File Wrapper of said Patent, being Defendants' Exhibit 2 See Record, page 72

The Patents cited in said File Wrapper, viz:

Patent to N. S. Baldwin and E. S. Goodwin, April 7, 1896, No. 557,754, Defendants' Exhibit 3. See Record, Page 72

Patent to J. G. Cooner, December 29, 1908, No. 908,076, Defendants' Exhibit 4. See Record, page 72

Patent to Jacques Rousso, April 9, 1912, No. 42,398, Defendants' Exhibit 5. See Record, page 72

Patent to L. Straub, September 17, 1912, No. 1,038,984, Defendants' Exhibit 9. See Record, page 73

Patent to T. K. Taylor, February 4, 1913, No. 1,052,292, Defendants' Exhibit 6. See Record, page 72

Patent to Guy Reid, July 15, 1913, No. 1,067,622, Defendants' Exhibit 7. See Record, page 73

Patent to T. Heins and E. R. Galland, November 11, 1913, No. 1,078,501, Defendants' Exhibit 8 See Record, page 73

Here follows Official FILING RECEIPT.

Dated August 13 1913. Serial No. 784,544.

FILE WRAPPER

* *

Patent issued to

CHARLES F. BROWN

November 3, 1914. No. 1,115,895.

TOWEL HOLDERS

Application filed August 13, 1913, Serial No. 784,-
544.

Here follows PETITION in due form.

Here follows descriptive part of specification which was not changed by amendment, and therefore is shown by the same part printed in the patent, copy of which is hereto attached.

The claims as originally appearing in the specification, the actions of the Patent Office, and the amendments making the claims as printed in said patent were as follows:

~~Claims in re patent of Charles F. Brown No. 1115895~~

~~1. In a towel holder or the like, the combination
movable~~

~~A with a supporting member, of a flexible towel retain-
ing member secured in its entirety thereto.~~

~~2. In a towel holder or the like, the combination
movable~~

~~of a supporting member, of a flexible towel retaining
B member, and means for detachably securing the latter
in its entirety to the former.~~

1. ~~3.~~ In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member cooperative therewith for the purpose specified, and means for securing both ends of said retaining member to the assembling member.

2. ~~4.~~ In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member cooperative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together.

~~5. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member cooperative with said assembling member.~~

~~6. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member carried by said assembling member cooperatively with said supporting member.~~

~~7. In a towel holder or the like, the combination with a supporting member provided with a socket, of an assembling member mounted in said socket, and a retaining member detachably secured to the assembling member.~~

per B

8. In a towel holder or the like, the combination with a supporting member provided with a socket, of

~~an assembling member mounted therein, a retaining member carried by the assembling member, and common means for securing the retaining member to the assembling member and the assembling member to the supporting member.~~

3 9. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detachably securing the free end of the retaining member to the socket end of the assembling member.

4 10. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detachably securing the free end of the retaining member to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

~~11. In a towel holder or the like, the combination with a supporting member, of a towel assembling member provided with a threading point, and means for operatively uniting said members, substantially for the purpose specified.~~

Witnesses:

Charles F. Brown

K. D. Fenn

Joseph L. Atkins

Here follows OATH in due form.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington Dec. 12, 1913.

Mailed “ “ “

Joseph L. Atkins,
809 Chamber of Commerce,
Portland, Oregon.

Please find below a communication from the EX-AMINER in charge of the application of Charles F. Brown, 784,544, filed Aug. 13, 1913, for Towel Holders.

Thomas Ewing,
Commissioner of Patents.

Claims 1, 2, 3, 5 and 6 are rejected on Reid, 1,067,-622, July 15, 1913 (45/32).

Claims 4 and 8 are rejected on Reid, in view of Taylor, 1,052,292, Feb. 4, 1913 (43/32).

Claim 4 is also rejected as not being warranted by the disclosure.

Claims 9 and 10 are rejected on Reid and Taylor, in view of Heins, 1,078,501, Nov. 11, 1913 (45/32).

Claim 11 is rejected on the above cited references in view of Baldwin, 557,754, Apr. 7, 1896 (129/8).

Attention is directed also to Cooner, 908,076, Dec. 29, 1908 (211/17).

Walter Johnson, Examiner Div. VIII.
H. A. W.

MAIL ROOM

Feb. 24, 1914

U. S. PATENT OFFICE

U. S. PATENT OFFICE

Feb. 25, 1914

DIVISION 8, Paper No. 3

UNITED STATES PATENT OFFICE

Charles F. Brown

Towel Holder

Filed Aug. 13, 1913

Ser. No. 784,544.

Portland, Oregon, February 19, 1914.

Hon. Commissioner of Patents,
Washington, D. C.

SIR:

Responsive to official action of December 12, 1913.
Please amend as follows:

Claim 1, line 2, before "supporting" insert "movable."

Claim 2, line 2, before "supporting" insert movable."

This application was drawn in view of the references cited, and upon a device which in practice corrects the deficiencies of the subject matter of the several references.

Referring to the claims seriatim, claim 1 calls for a retaining member, to-wit, the chain 19, secured in its entirety to a supporting member or shelf 1. Reid shows no such construction, but shows a lock-case 2, and separate ring 6. Assuming that the examiner has upon a strained construction included the wall to which the

members 2 and 6 may be attached in order to constitute a supporting member, amendment of the claim has been made, although it is submitted that such a construction is inadmissible.

Claim 2 is amended in like manner and for corresponding reasons as claim 1.

Claim 3 calls for a combination in which both ends of the chain are secured to the assembling member, or member 4. Reid shows no such construction. The inclusion of the wall by construction cannot be made in respect to claim 3, because applicant's assembling member 4 corresponds in function to Reid's member 1 and 1a. There is a distinct utility in the subject matter defined in claim 3, in that it renders the entire length of the looped chain available to the user of a towel, while the reach of Reid's chain is much restricted.

In respect to claim 4, neither Reid nor Taylor shows means for detachably securing both ends of the retaining member together. Let it be noted that in applicant's construction his assembling member constitutes an elongated link of special function in the retaining member. Taylor shows and describes a duplicated rack, whereof two arms 8 are united. Taylor's part 7 corresponds to applicant's assembling member 4, and his arm 8 to applicant's retaining member. Taylor's arm 8 is not united to the part 7 of his rack except at one end, and there is no intercommunication between Taylor's arm 8, upon which one may be predicated as a continuation of the other.

The Examiner's objection that claim 4 is not warranted by the disclosure, is not made clear. If insisted upon, a more particular statement is requested, but it is believed that discriminating reconsideration will remove this objection.

In respect to claim 5, an assembling member swiveled to the supporting member is called for, and is not shown in Reid. On the contrary Reid shows a lock in Fig. 3, which prohibits rotative movement of the member 1. In Fig. 4, the locking device 2a is described as identical with that shown in Fig. 3.

The above observation applies also to claim 6.

Argument in support of claims 3 and 4 is applicable to claim 8.

The action in respect to claims 9, 10 and 11, it is submitted, is either not clear, or is clearly unwarranted. The practice of collocating a plurality of separate and distinct references to meet a distinct combination has been so often condemned, both by the courts and in patent office practice, as to require no serious consideration. A restatement of the grounds of rejection, or reversal of action is solicited.

This application is, in view of the foregoing, deemed to be in condition for allowance, and that action is accordingly solicited.

Very respectfully,
CHARLES F. BROWN,
By Joseph L. Atkins, Attorney.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington, Mar. 26, 1914.

Mailed

“ “ “

Joseph L. Atkins
809 Chamber of Commerce
Portland, Ore.

Please find below a communication from the Examiner in charge of the application of Charles F. Brown, 784,544, filed Aug. 12, 1913, for Towel Holders.

THOMAS EWING,
Commissioner of Patents.

Amendment of Feb. 24, 1913, is of record.

Claims 1 and 2 are rejected on Taylor, of record, or Rousso, Design 42,398, Apr. 9, 1912, in view of Reid, of record. It does not involve invention to substitute the retaining member of Reid for that of Taylor or Rousso. These claims are also objectionable as being indefinite in terms. The expression “in its entirety” does not set forth any structure.

As far as set forth in claim 3, the ends of the flexible member are secured to the retaining member only as to a convenient support. To secure the lower end of Reid's flexible member to any other convenient part of the device than that selected by the patentee does not involve invention or patentable novelty. Claim 3 is accordingly rejected.

Claim 4 is rejected either as not being warranted by the disclosure or as being met by Reid. If the ap-

plicant shows means for connecting the ends of the flexible member, Reid does also.

Claims 5, 6, 7 and 8 and 11 are rejected as reading directly on Heins, of record.

Claims 9 and 10 stand rejected on Heins and Reid, of record. It does not apparently involve invention to substitute the retaining member of Reid for that of Heins. These claims are also rejected as being inaccurate. The retaining member does not appear to be flexibly secured to the assembling member. It is pivotally secured.

H. LEWIS,
Examiner.

H.A.W.

JUL 28 1914

U. S. PATENT OFFICE

Room 131

Charles F. Brown

Serial No. 784,544

Filed August 13, 1913

Towel Holders.

Portland, Oregon, July 23, 1914.

Hon. Commissioner of Patents,
Washington, D. C.

SIR:

Response to official letter of March 22.

Under date of February 19, 1914, counsel for applicant submitted a paper by way of amendment, in which painstaking effort was made, by compliance with rule 68, to assist in the disposition of this case.

It is with all due respect submitted that the reply of March 26th is not reciprocal either in matter or form. In almost every instance, although the claims are substantially the same, the grounds of rejection set up in Paper No. 2 are in paper No. 4 shifted, without any explanation whatever. Such action is not calculated to promote or even to admit of intelligent response, and is not believed to constitute a proper compliance with the requirements of the rules of practice. The nature of the last official action taken in this case is fairly summarized in the last two sentences thereof, namely: "The retaining member does not appear to be flexibly secured to the assembling member. It is pivotally secured." It ap-

pears to be unnecessary to submit argument that a pivotal connection is a flexible connection, inasmuch as it must be apparent to anyone having the least skill in the art or any mechanical art, that any possible connection between a chain and a rigid member is a flexible connection.

With respect to claims 1 and 2, which in paper No. 2 were rejected on Reid, and are in paper No. 4 rejected on Taylor or Roussio, it is submitted, as it was formerly in Paper No. 3, that Reid does not show the construction claimed. Neither Taylor nor Roussio shows anything approximating the construction, nor a construction which is interchangeable one with the other.

It has been repeatedly held that the charge of infringement cannot be escaped by allegation or proofs that parts of a combination are to be separately found in different prior patents.

Bates vs. Coe, 98 U. S. 31-50.

Parks vs. Booth, 102 U. S. 96.

It is scarcely necessary to argue that grounds of rejection of a claim and a defense against infringement are in all respects identical. It would appear that grounds of rejection urged against claims 1 and 2 are made in disregard of the authorities cited, which reflect, it is submitted, the law on the subject beyond controversy.

In respect to claim 3, if the examiner's argument is understood, it means that Reid's chain has its ends connected, because they are both attached to a wall. This

appears to exclude arbitrarily that which constitutes the very gist, in part, of applicant's invention.

It is error for the examiner to say, "The ends of the flexible member are secured to the retaining member only as to a convenient support." On the contrary, the combination described in Figure 3 defines a special construction and a distinct utility. It is this, in the Reid device, as shown partly in Figure 2, each individual towel must be used in close proximity to the other towels, clean and soiled, upon the holder. Of course, it may be said that this situation may be relieved by increase of length of chain. But this does not meet the situation. To increase the length of chain beyond certain limits is impracticable, and would tend to defeat the purpose of the device, in the kinking of the chain, for example. Applicant has devised means for obtaining the maximum availability of each individual towel in use without impairment of the certainty of operation of the device.

The grounds of rejection of claim 4 are not understood, unless they be substantially the same as those urged against claim 3. In that event they are submitted to be, equally with claim 3, inapt. A more specific statement of grounds of rejection, in view of applicant's argument in paper No. 3, is requested.

In respect to claims 5, 6, 7, 8 and 11, it is observed that although in the last official letter they are rejected on Heins of record for the first time, having been previously rejected upon other references, they are now said to read directly on Heins. This allegation is traversed.

Claim 5 covers in combination the following elements:

1. A supporting member.
2. An assembling member swiveled to the supporting member.
3. A retaining member co-operative with said assembling member.

Heins shows two supports, a tube 4 for the upper support, and a rod 5 for the lower. It is supposed that the terms employed in the claim are understood to be selected for the purposes of distinction only. Nevertheless, it is submitted that the principle and functions of their subject matter are clearly intelligible, and are clearly distinguishable from Heins. The examiner, if he persists in previous action, is requested to indicate what he regards in Heins as a supporting member, what as an assembling member, and what as a retaining member.

The rejection of the remaining claims of the group last named is believed to be made upon reasons that are not clearer than the rejection of claim 5, and further explanation or withdrawal of the rejection is solicited.

The grounds of rejection of claims 9 and 10 is not understood. There is no relationship between Heins and Reid of record. If it were conceded that as between Reid and Heins there is the difference only of a flexible and a rigid retaining member, yet, so far as applicant is concerned, there is no such close similarity.

In respect to Claims 9 and 10, not only does the argument previously submitted in support of claim 3 apply, but also additional means are comprehended in the claim for securing the flexible member a maximum limit of movement.

So far as counsel for applicant can discover, this application is in condition for allowance, and action accordingly is solicited.

Very respectfully,

CHARLES F. BROWN,

By Joseph L. Atkins, his Attorney.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington, Aug. 24, 1914

Mailed

“ “ “

J. L. Atkins

809 Chamber of Commerce

Portland, Ore.

Please find below a communication from the Examiner in charge of the application of Charles F. Brown 784,544, filed Aug. 13, 1913, for Towel Holders.

THOMAS EWING,
Commissioner of Patents.

Responsive to letter of July 28, 1914.

Claims 9 and 10 are informal as of record.

Claims 1, 2, 5, 6, 7 and 11 stand rejected on the references and for the reasons set forth in the last office action.

Heins appears to show the relation of elements called for by claims 5, 6 and 7. He shows a support 1, provided with a socketed member 2, in which is swiveled an assembling member 4, to which is detachably secured a retaining member 5.

Claim 8 is rejected on.

Straub, 1,038,984, Sept. 17, 1912 (45/32).

As at present advised, claims 3, 4, 9 and 10 are allowable subject to the objections of record.

GEO. P. TUCKER,
Examiner.

H.A.W.

Mail Room
Sept. 8, 1914
U. S. Patent Office
Room 131

Division 8, Paper No. 7
Sept. 9, 1914
U. S. Patent Office

UNITED STATES PATENT OFFICE.

Charles F. Brown.
Serial No. 784,544
Filed August 13, 1913
Towel Holders.

Portland, Oregon, September 3, 1914.

Hon. Commissioner of Patents,
Washington, D. C.
Sir:

Response to official letter of August 24, 1914.

The alleged informality of claims 9 and 10, appears to be, that the retaining member is not flexibly secured to the assembling member. This, as was observed in the last action, appears to be an absurdity. Its reiteration suggests that there is a mistake made somewhere, and the indulgence of the examiner is therefore requested. The assembling member is the member 4 clearly shown in Fig. IV. The retaining member is the member 19 on the same figure. They are flexibly united at 18, and are not pivotally secured together.

It is believed that there is now no room for doubt, that the allegation of informality will be withdrawn.

In respect to the action on the merits, applicant denies the pertinency of the references to claims 1, 2, 5, 6, 7,

8 and 11. He is, however, satisfied to accept allowance upon claims 3, 4, 9 and 10, subject to such construction as they are entitled to receive in view of the prior state of the art and without restriction in consequence of the imputed disclaimer upon his part.

He, therefore, without prejudice to his just rights in the premises, authorizes and requests erasure of all the claims, except claims 3, 4, 9 and 10. With respect to those claims, it is requested that their numerals be changed to 1, 2, 3 and 4, respectively, and that the application be passed to issue.

Very respectfully,

CHARLES F. BROWN,
By Joseph L. Atkins, Attorney.

Here follows Official NOTICE OF ALLOW-
ANCE in due form, dated September 21, 1914.

Here follows Official Receipt of final fee in due form
giving date patent will issue as Nov. 3, 1914.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title.)

IT IS HEREBY STIPULATED AND CER-
TIFIED that the foregoing is a full, true and complete
copy of the file wrapper in the application for patent of
Charles F. Brown, filed August 13, 1913, Serial No.
784,544, series of 1900, for improvement in Towel Hold-
er, such application having been allowed September 21,
1914, and letters patent thereon being issued November
3, 1914, No. 1,115,895, and that this file wrapper may
be introduced in evidence by either party to the same
effect as if the same had been certified by the United
States Patent Office.

Dated, Portland, Oregon, November 18, 1915.

JOSEPH L. ATKINS,

Solicitor for Plaintiff.

T. J. GEISLER,

Solicitor for Defendants.

Here follows Official NOTICE OF ALLOW-
ANCE in due form, dated September 21, 1914.

Here follows Official Receipt of final fee in due form
giving date patent will issue as Nov. 3, 1914.

*In the District Court of the United States for the
District of Oregon.*

No. 6719.

(Title.)

IT IS HEREBY STIPULATED AND CER-
TIFIED that the foregoing is a full, true and complete
copy of the file wrapper in the application for patent of
Charles F. Brown, filed August 13, 1913, Serial No.
784,544, series of 1900, for improvement in Towel Hold-
er, such application having been allowed September 21,
1914, and letters patent thereon being issued November
3, 1914, No. 1,115,895, and that this file wrapper may
be introduced in evidence by either party to the same
effect as if the same had been certified by the United
States Patent Office.

Dated, Portland, Oregon, November 18, 1915.

JOSEPH L. ATKINS,

Solicitor for Plaintiff.

T. J. GEISLER,

Solicitor for Defendants.

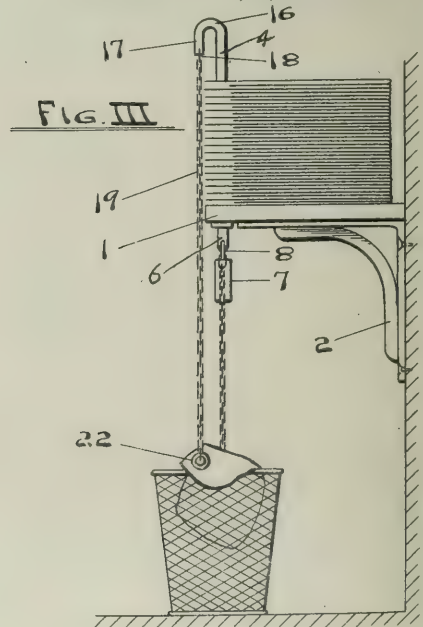
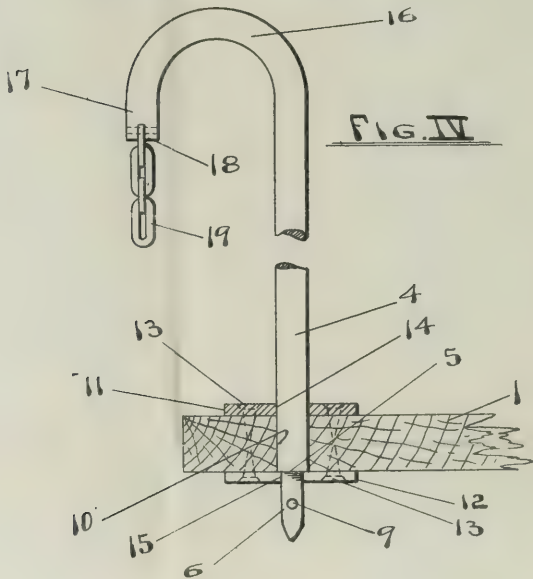
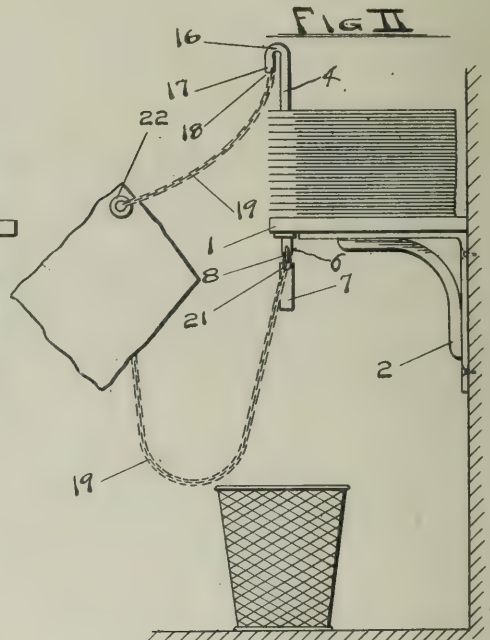
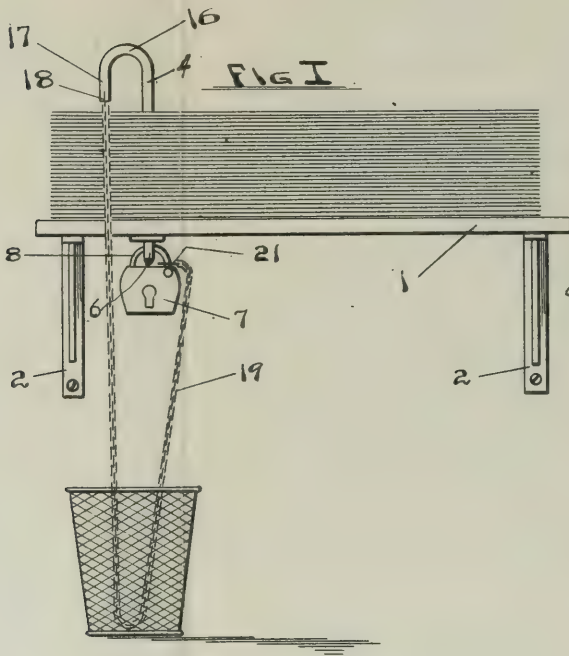
APPELLEE'S (PLAINTIFF'S) EXHIBIT "A"

Patent to C. F. Brown, Nov. 3, 1914, No. 1,115,895.

C. F. BROWN.
TOWEL HOLDER.
APPLICATION FILED AUG. 13, 1913.

1,115,895.

Patented Nov. 3, 1914.



WITNESSES:

H. D. Fern
E. M. Mathered

INVENTOR:

Charles F. Brown,

BY

Joseph H. Perkins
ATTORNEY.

UNITED STATES PATENT OFFICE.

CHARLES F. BROWN, OF PORTLAND, OREGON, ASSIGNOR TO BROWN-MEYER COMPANY,
OF PORTLAND, OREGON, A CORPORATION OF OREGON.

TOWEL-HOLDER.

1,115,895.

Specification of Letters Patent.

Patented Nov. 3, 1914.

Application filed August 13, 1913. Serial No. 784,544.

To all whom it may concern:

Be it known that I, CHARLES F. BROWN, a citizen of the United States of America, residing at Portland, in the county of Multnomah, in the State of Oregon, have invented certain new and useful Improvements in Towel-Holders, of which the following is a specification, reference being had to the accompanying drawing.

My invention relates to towel holders, and has for its object the production of a device for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry until such time as they are required, one by one, for use.

A further object of the invention is to provide means for conveniently withdrawing the towels one by one from the pile, for facilitating the manipulation of it while in use, and for securing it against accidental misplacement or intentional and unauthorized removal after use.

What constitutes my invention will be hereinafter specified in detail and succinctly set forth in the appended claims.

In the accompanying drawing: Figure I is a front elevation of my invention complete in its present preferred form of embodiment. Fig. II is an end elevation of the same, looking toward that end of the device upon which the clean towels are assembled, and showing one of the towels removed from the pile of clean towels as in use. Fig. III is a view similar to Fig. II showing the towel as illustrated in use in Fig. II dropped to that position in which it is discarded after use, wherein the used towels accumulate and are secured, until the supply of clean towels is exhausted or until so many of them have been used as may be required in service before replenishment of the clean supply. Fig. IV is a vertical sectional view illustrating the clean towel assembling member in place on an enlarged scale.

Referring to the numerals on the drawing, 1 indicates a horizontal supporting member, or, as illustrated, a shelf, which, being of any suitable shape and dimensions and made of any preferred material, is adapted to be held in any desired position, as against any vertical wall, upon brackets 2. The shelf illustrated is presented by way

of example only, and is intended to represent any suitable instrumentality for the function required of it, whether it be a simple shelf or a part of a cabinet or other device. The function of the shelf 1 is to carry a pile of clean, preferably folded, towels which may be of any preferred size, and whose size will, of course, determine the dimensions of the shelf 1.

In combination with the shelf 1, and for securing the towels in assemblage thereupon, I prefer to employ an assembling member 4, which I prefer also to swivel and detachably secure to the shelf 1. For this purpose, the lower end of the member 4 may be reduced to form a shoulder 5, the reduced end 6 extending below and clear of the shelf 1 to accommodate means for detachably securing the member 4 in place. Such means may consist, as shown, of a padlock 7, whose shackle 8 passes through an aperture 9 provided for its free passage through the reduced end 6 below the shelf 1.

For insuring a stable support for the assembling member 4 rotatably upon the shelf 1, I prefer to provide a suitable socket upon the shelf. This socket may consist of an aperture or bore 10 formed in the material of which the shelf 1 is composed so as to snugly fit about the assembling member, whose shape, as well as that of the conforming socket, is preferably cylindrical. To lend durability to the bearing parts of the socket, the bore 10 may be reinforced by a top plate 11 and a bottom plate 12, secured respectively as by screws 13 to opposite sides of the shelf 1. The top plate is penetrated by an aperture 14 made to snugly fit the end of the assembling member 4 while the bottom plate is provided with an aperture 15, assembled coaxially with the aperture 14 of the top member, but of smaller diameter to fit the reduced end 6 of the assembling member. By this construction the assembling member is rotatably secured in the socket provided for it, and is supported therein by an engagement between the shoulder 5 with the circumscribing wall of the aperture 15 in the bottom plate. The aperture 9 in the reduced end of the assembling member is located in such close juxtaposition to the lower side of the bottom plate as to render the shackle of the padlock 7 when in place a confining member that will serve to secure the assem-

bling member rotatably in the upright position upon the shelf 1.

The member 4 extends preferably in a direct line above its supporting socket for a distance proportionate to the number and character of the towels that are, in service, assembled upon it, and it preferably terminates at its free end in a curved neck 16, terminating in a depending end 17. By reason of the function of the assembling member, as will be hereinafter made more fully to appear, it is desirable that the neck of the assembling member should terminate at a distance above the shelf 1 substantially equal to or a little greater than the thickness of the maximum towel-supply upon the shelf 1 about the member 4.

In connection with the assembling member and its shelf I provide means for confining the towels during use and after use by a towel retaining member whose function being that of securing them against loss or unauthorized abstraction I prefer not only to flexibly unite, as indicated at 18, to the depending end 17 of the neck 16 of the assembling member, but also to constitute it of flexible material or substantially in the form of a chain, as illustrated. The flexible member or chain 19 is preferably permanently united to the depending end 17 of the neck, while its free end is removably secured to the other end of the member 4, preferably by the aid of an eyelet 21 through which the shackle 8 of the padlock is passed when the padlock is secured in place upon the lower end of the member 4 as in the manner previously specified.

Each of the towels above referred to being, as has been specified, of any preferred material and dimensions, is provided, preferably near one corner, with a gromet 22, (see Fig. II) which adapts it to slide freely upon the member 4 but with amply secure attachment thereto.

In practice, each shelf, wherever installed, is provided with its assembling member and means for securing it in place, and is designed to afford an ample supply of towels under approved sanitary conditions. Such conditions require that an uninterrupted supply of clean towels shall be provided to meet the demands in service of each installation. In making provision to that end, the means for supplying each device with fresh supplies of towels must take into consideration numerous conditions. For example, inasmuch as a supply attendant, in order to cover economically a territory assigned to him, must carry as little weight as possible, I provide by my invention for dispensing, in this connection, with all weight except that of the towels themselves. But it is also necessary to economize time in making the distribution of clean towels and the collection

of soiled ones. My invention is in all respects, and more particularly in respect to the shape of the assembling member and the relation of its parts to the whole, adapted to facilitate and to effect in the shortest space of time the stringing of the towels upon the assembling member through their respective gromets; the stripping of the soiled towels from the retaining member of the device; and the adjusting and securing of the several parts in operative position. In this connection it may be observed that while the neck 16 and its depending end 17 serve to confine the clean towels upon the shelf against accidental displacement, the termination of said depending end at a distance above the shelf equal to or greater than the thickness of the maximum pile of towels thereon renders it practicable and convenient to insert the assembling member through the gromet of the towels and secure it in place with that minimum degree of attention which the manipulation of a simple straight rod would entail.

The rigidity of the assembling member, which is preferably made a feature thereof, serves to secure the clean towels in place upon the shelf, while the flexibility of the retaining member, constituting as it does in fact a continuous extension of the assembling member, provides for the widest latitude of manipulation of the individual towels in use. It may be further observed that to facilitate and expedite towel service supply in connection with my towel holder, it is contemplated, in practice, that the towels will be assembled and tied in bundles at the laundry or source of supply, with all the gromets of each bundle in register. In consequence, opportunity for crumpling or soiling of the towels in transit is minimized, and all that remains for the attendant to do, in supplying a bundle to the holder after removal of the soiled towels, is to lay the fresh bundle on the shelf 1, then set and secure the assembling member 4 in place upon the shelf, after first inserting it through the alined gromets of the bundle. Toward this end, I prefer to finish the end 6 of the member 4 with a threading point, rounded or conical, as shown clearly in Fig. IV.

I claim:

1. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member coöperative therewith for the purpose specified, and means for securing both ends of said retaining member to the assembling member.
2. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member,

a flexible retaining member coöperative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together.

5 3. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detach-
10 ably securing the free end of the retaining member to the socket end of the assembling member.

4. In a towel holder or the like, the com-

bination with a supporting member pro- 15
vided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detach- 20
ably securing the free end of the retaining member to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

CHARLES F. BROWN.

Witnesses:

K. D. FENN,

JOSEPH L. ATKINS.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "3"

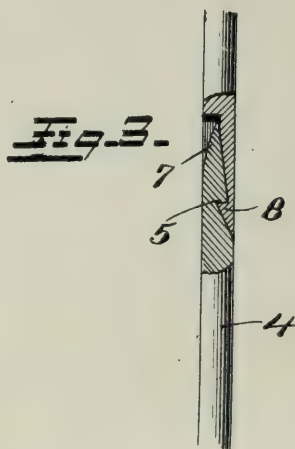
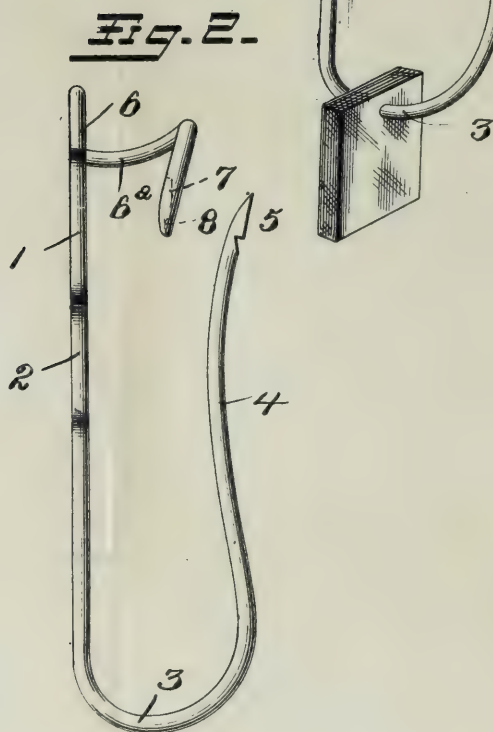
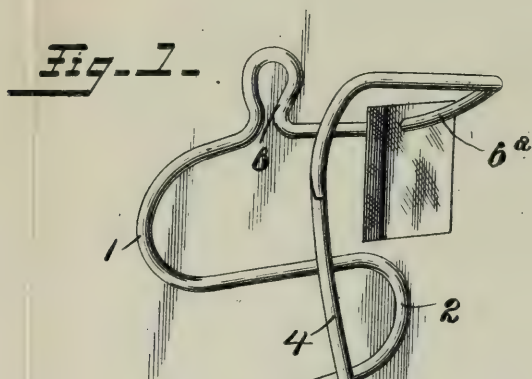
Patent to Baldwin & Goodwin, Apr. 7, 1896, No. 557,754.

(No Model.)

N. S. BALDWIN & E. S. GOODWIN.
BILL FILE.

No. 557,754.

Patented Apr. 7, 1896.



Witnesses

H. J. North
P. M. Smith

By *their* Attorneys.

Inventors
Nelson S. Baldwin
and
Ervin S. Goodwin

Cashow & Co.

UNITED STATES PATENT OFFICE.

NELSON S. BALDWIN AND ERVIN S. GOODWIN, OF SPOKANE, WASHINGTON.

BILL-FILE.

SPECIFICATION forming part of Letters Patent No. 557,754, dated April 7, 1896.

Application filed June 11, 1895. Serial No. 552,447. (No model.)

To all whom it may concern:

Be it known that we, NELSON S. BALDWIN and ERVIN S. GOODWIN, citizens of the United States, residing at Spokane, in the county of Spokane and State of Washington, have invented a new and useful Bill-File, of which the following is a specification.

This invention relates to an improvement in bill-files, and has for its object to provide a simple and efficient form of device adapted to receive and hold letters, bills, or papers of any kind, and by means of which any particular bill or paper may be removed independently of and without detaching the other papers.

Other objects and advantages of the invention will appear in the course of the subjoined description.

The invention consists in a bill-file made from a single piece of wire bent in such manner as to form a supporting eye or loop, by means of which it may be attached to a wall or vertical support and having reversely-curved portions forming a supporting-back for holding the device in position upon the wall, said device also comprising a paper-holding loop, a pointed and notched file-stem, and a curved switch having its end recessed and provided with a catch for engaging the pointed notched end of the file-stem.

The invention consists also in certain features and details of construction and arrangement of parts, as hereinafter particularly described, illustrated in the drawings, and finally embodied in the claims.

In the accompanying drawings, Figure 1 is a perspective view of an improved bill-file constructed in accordance with this invention. Fig. 2 is a side elevation of the same in position to receive bills or other papers. Fig. 3 is an enlarged detail section taken through the interlocking ends of the file-stem and switch-arm.

Similar numerals of reference designate corresponding parts in the several figures of the drawings.

Referring to the accompanying drawings, the bill-file contemplated in this invention is formed from a wire blank or single piece of wire having the required stiffness and elasticity. At or near its central portion this wire blank is bent in such manner as to form

a supporting-back comprising reversely-disposed curved portions 1 and 2, the curves or bends being made of such extent vertically and horizontally as to form a supporting-back of any desired area. After forming the supporting-back one terminal is extended downwardly any desired distance, according to the capacity which it is desired to impart to the file, and thence curved gradually forward to form the hook 3, which receives and holds the bills or other papers. This terminal is then extended upwardly to form the file-stem 4, the upper extremity of which is pointed for facilitating the impaling or puncturing of the bills or papers. Slightly below the point of the file-stem a notch 5 is formed, said notch being arranged in the face of the file-stem which lies adjacent to the extremity of the other terminal, hereinafter described. The other terminal, after forming the supporting-back of the file, is first bent to form a loop or eye 6, by means of which the device may be supported upon a convenient nail projecting from the wall, and then curved forwardly and to a slight extent upwardly to form an inclined switch 6', adapted at certain times to receive and hold a portion of the bills or papers, as hereinafter explained. The extremity of this terminal is now bent downwardly into line with the other terminal or file-stem and is provided with a recess or socket 7, adapted to receive and snugly embrace the pointed tapering end of the file-stem. This socket in the terminal of the switch is formed with an internally-arranged spur or catch 8, which is adapted to engage the notch in the pointed end of the file-stem when the terminals are brought together, as shown in Figs. 1 and 3.

By means of the construction hereinabove described it will be apparent that the device may be rendered capable of receiving any number of bills or papers, that the same may be quickly placed thereon, and that when any particular bill or paper is wanted the bills or papers which lie in front of the same may be moved upwardly and passed over the junction between the terminals and upon the switch, after which the file-stem may be disengaged from the terminal of the switch and allowed to spring forward into its normal position, as indicated in Fig. 2, whereupon the desired bill or paper may be removed from the file.

It will be seen that when the terminals are in engagement, as indicated most clearly in Fig. 3, they will be prevented from moving vertically out of engagement, will be held in close engagement by the spring-pressure of the file-stem, and may be disengaged only by pressing the file-stem laterally in a manner that will be readily understood. The object in inclining the switch-arm as shown is to give the bills or papers a tendency to slide away from the terminal of the switch or toward the wall for preventing the same from escaping or being blown from the terminal of the switch.

It will be apparent that changes in the form, proportion, and minor details of construction may be resorted to without departing from the spirit or sacrificing any of the advantages of this invention.

Having thus described the invention, what is claimed as new, and desired to be secured by Letters Patent, is—

1. A bill-file made from a wire blank, the same being given one or more convolutions to form a supporting-back, one of the terminals being bent forward, recurved and then extended substantially parallel to and in advance of the back to form the file-stem, the opposite terminal being extended to one side,

then forwardly to form a lateral switch, the said terminal being finally brought into the proximal plane of the stem and formed to receive the point of the stem, substantially as and for the purpose described.

2. A bill-file made from a single wire blank recurved one or more times in the same plane to form a supporting-back, and also provided with an eye or loop for suspending the same, said device also comprising a forwardly-extending paper-hook, an upwardly-extending pointed terminal arranged in advance of the supporting-back, a laterally-disposed switch formed by extending the other terminal of the blank to one side of the center then forward and finally bringing its extremity into the proximal plane of the aforesaid terminal, the end of the switch having a recess or socket therein for receiving the point of the file-stem, substantially as and for the purpose described.

In testimony that we claim the foregoing as our own we have hereto affixed our signatures in the presence of two witnesses.

NELSON S. BALDWIN.
ERVIN S. GOODWIN.

Witnesses:

C. V. HAUGE,
F. H. FLANDERS.

APPELLANTS' (DEFENDANTS') EXHIBIT "4"

Patent to J. G. Cooner, December 29, 1908, No. 908,076

J. G. COONER.
DISPLAY DEVICE.

APPLICATION FILED AUG. 10, 1908

908,076.

Patented Dec. 29, 1908.

FIG. 3

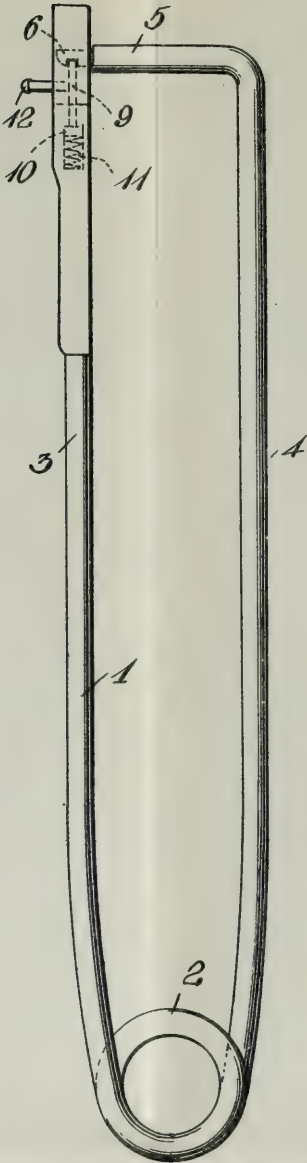


FIG. 2

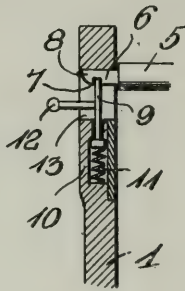


FIG. 1

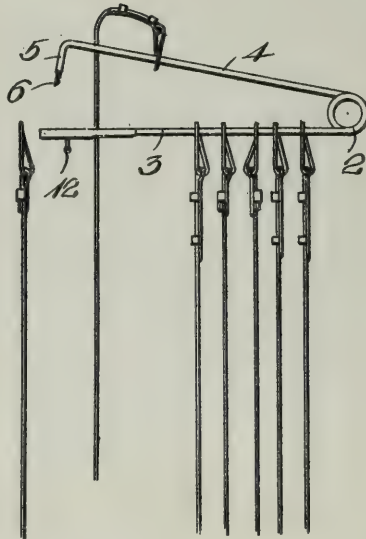
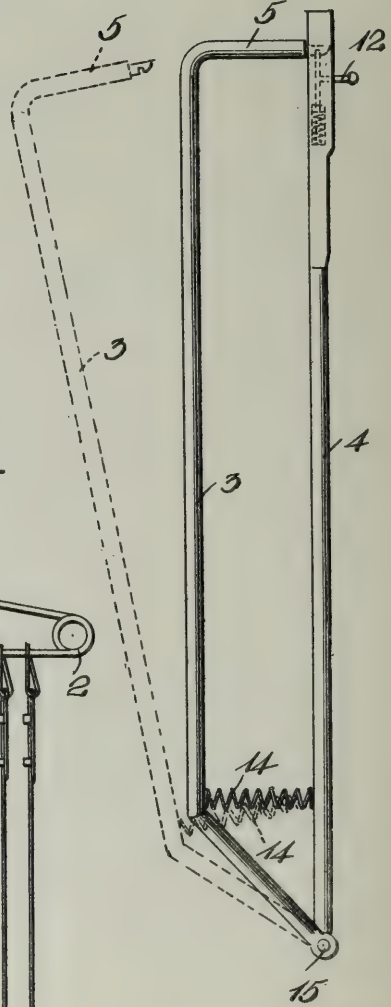


FIG. 4



Witnesses

E. H. Griesbauer

C. H. Griesbauer

Inventor

John G. Cooner

By *A. B. Wilson & Co.*

Attorneys

UNITED STATES PATENT OFFICE.

JOHN G. COONER, OF MACON, GEORGIA.

DISPLAY DEVICE.

No. 908,076.

Specification of Letters Patent.

Patented Dec. 29, 1908.

Application filed August 10, 1908. Serial No. 447,801.

To all whom it may concern:

Be it known that I, JOHN G. COONER, a citizen of the United States, residing at Macon, in the county of Bibb and State of Georgia, have invented certain new and useful Improvements in Display Devices; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention relates to devices for displaying articles of merchandise, and particularly to devices for supporting and displaying belts.

The object of the invention is to provide a cheap and efficient device of this character upon which the belts may be hung so as to display the same, and whereby any belt may be selected from a number of belts upon the rack without removing the others.

A further object of the invention is the provision of means for automatically locking the parallel bars of the rack together so that the belts thereon cannot be removed.

With these and other objects in view, the invention consists of certain novel features of construction, combination and arrangement of parts, as will be more fully described and particularly pointed out in the appended claim.

In the accompanying drawings, Figure 1 is a side elevation of the device with a number of belts attached thereto, and showing how a particular belt may be removed without removing the remainder on the rack, Fig. 2 is a fragmentary longitudinal section showing the locking device, Fig. 3 is an enlarged side elevation, Fig. 4 is a modified form shown in side elevation.

Referring more especially to the drawings, and particularly to Figs. 1 and 2, 1 represents a single strip of metal preferably in the form of heavy wire which is bent intermediate its length in the manner of safety pins as at 2, to form a spring loop, which connects the parallel sides 3 and 4 of the device. At one end the device is bent at right angles to form the locking extension 5, which is reduced at its extreme end as at 6, and provided with a latch receiving notch 7, and a beveled end 8, which throws the latch bar 9

out of normal so that the device is locked automatically. The latch bar 9 is carried by a casing 10, which is secured to the extreme end of the bar 3, and is impelled to normally engage the notch 7 by a spiral spring 11. A suitable operating handle 12 is formed integral upon the bar 9, and projects through the slot 13, formed in the casing 10.

In the modification shown in Fig. 3 the spring loop is dispensed with, and a spiral spring 14 is arranged between the parallel bars at the opposite end from the latch portion so as to normally spread the members as shown in dotted lines. With this type of construction two halves 3 and 4 are hinged together at their rear ends as at 15, or the material may be greatly attenuated at this point to permit free movement of the parts.

From the foregoing description, taken in connection with the accompanying drawings, the construction and operation of the invention will be readily understood without requiring a more extended explanation.

Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advantages of this invention as defined in the appended claim.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:—

A device of the class described comprising a pair of parallel members connected together at one end, one of said bars having its free end bent at right angles to its longitudinal plane and being notched, and a spring bolt carried by the other member at its free end adapted to engage said notch, said spring bolt being normally pressed toward the end of said member, the end of said spring bolt member being extended only slightly beyond the end of the notch member, whereby articles may be slipped from one member to the other.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

JOHN G. COONER.

Witnesses:

ROLAND T. MAHONE,
F. T. VINCENT.

APPELLANTS' (DEFENDANTS') EXHIBIT "5"

Patent to Jacques Rousso, April 9, 1912, No. 42,398

DESIGN.

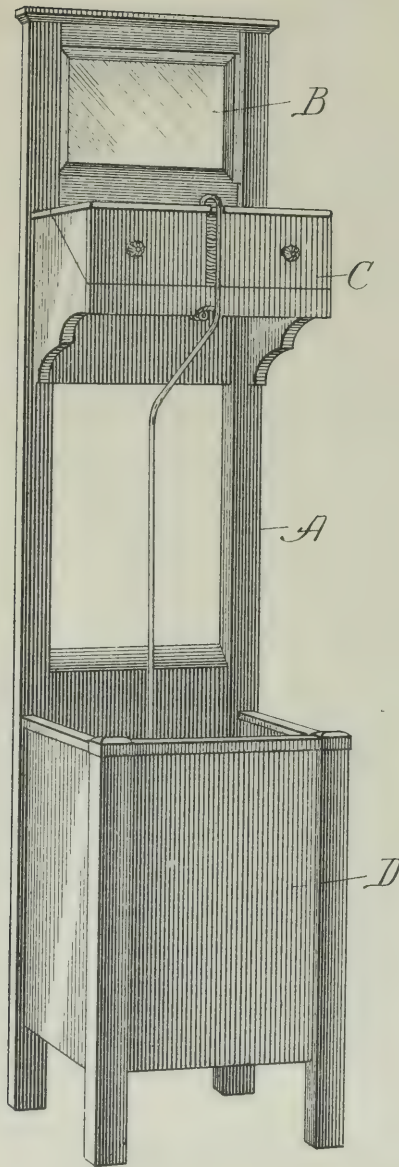
J. ROUSSO.

TOWEL CABINET.

APPLICATION FILED JAN. 5, 1912.

42,398.

Patented Apr. 9, 1912.



Witnesses:

John Enders
Henry A. Parks

Inventor:

Jacques Rouso,
by Sheridan, Winson, Scott & Richmond,
Attys.

UNITED STATES PATENT OFFICE.

JACQUES ROUSSO, OF CHICAGO, ILLINOIS.

DESIGN FOR A TOWEL-CABINET.

42,398.

Specification for Design.

Patented Apr. 9, 1912.

Application filed January 5, 1912. Serial No. 669,709. Term of patent 14 years.

To all whom it may concern:

Be it known that I, JACQUES ROUSSO, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new, original, and ornamental Design for a Towel-Cabinet, of which the following is a specification.

Referring to the accompanying drawing which forms a part of this specification the figure is a perspective view of a towel cabinet showing my new design.

In the particular embodiment of my design shown in the drawing the standards

A support a mirror B at their top. Below this is a box or cabinet C containing clean towels. Directly underneath the box C is a receptacle D for soiled towels.

I claim:

The ornamental design for a towel cabinet as shown.

In testimony whereof, I have subscribed my name.

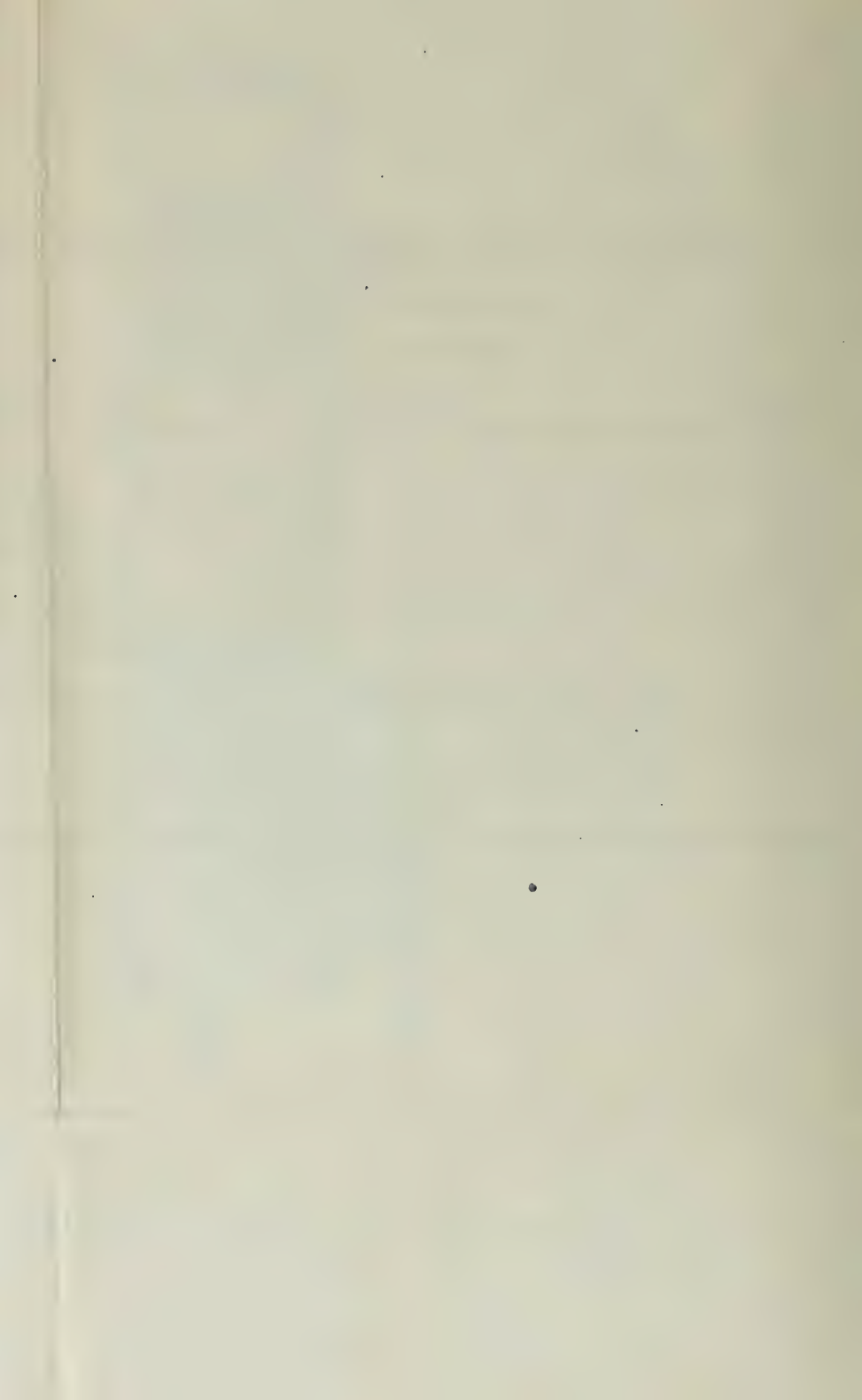
JACQUES ROUSSO.

Witnesses:

SAM WOLF,

CARL A. RICHMOND.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."



APPELLANTS' (DEFENDANTS') EXHIBIT "6"

Patent to T. K. Taylor, February 4, 1913, No. 1,052,292

TOWEL RACK.

1,052,292.

Witnesses

Frank Haugh
Wm. Koertli

Inventor

Thomas K. Taylor,

By Victor J. Evans

Attorney

UNITED STATES PATENT OFFICE.

THOMAS KING TAYLOR, OF WESLEYVILLE, PENNSYLVANIA.

TOWEL-RACK.

1,052,292.

Specification of Letters Patent.

Patented Feb. 4, 1913.

Application filed February 10, 1912. Serial No. 676,747.

To all whom it may concern:

Be it known that I, THOMAS K. TAYLOR, a citizen of the United States, residing at Wesleyville, in the county of Erie and State of Pennsylvania, have invented new and useful Improvements in Towel-Racks, of which the following is a specification.

The present invention relates to improvements in towel racks, the object of the invention being to provide a rack for towels which may be connected with a cabinet, mirror or the like, and which is adapted to support a number of clean towels and to direct the same to a suitable receptacle after each of the towels has been used successively.

With the above recited object in view, and others of a similar nature, the invention resides in the novel construction, and arrangement of towel racks set forth in and falling within the scope of the appended claim.

In the drawing, Figure 1 is a perspective view of a towel rack constructed in accordance with the present invention and showing the same in applied position upon a cabinet. Fig. 2 is an elevation of the rack, the connecting members thereof being disengaged.

Referring now to the drawing in detail, the numeral 1 designates a suitable mirrored cabinet, and 2 a receptacle adapted for the reception of soiled towels which is arranged below the cabinet.

The cabinet and the receptacle may be of any desired or preferred construction, and the numeral 3 designates the improved towel rack. This rack is constructed of a single piece of wire, and comprises a straightened longitudinally extending member or portion 4 which is sustained upon the bottom of the cabinet 1, through the medium of suitable substantially U-shaped clips 5. The opposite extremities of the longitudinal member 4 are provided with vertical extensions 6, the said extensions being also secured to the cabinet through the medium of clips, similar to the clips 5. The vertical members 6 are bent to provide horizontal inturned portions 7, the same being arranged at an angle to the cabinet and to the vertical extensions 6 and these horizontal members are curved upwardly and outwardly to

provide the substantially goose neck shaped side members of the rack. The free extremity of both of the arms 8 are formed with open eyes or hook members 9, and these members are adapted to be brought into engagement with each other to close or lock the said arms 8. The arms 8 are arranged directly above the open top or mouth 10 of the receptacle 2 and it will be noted that by parting the said hooked ends 9 the towels 11, which are arranged upon the arms 8 by being provided with suitable eyes or openings 12, may be removed from the rack and deposited within the receptacle 2. If desired the hooks may be made of such a size as to permit the towels dropping by gravity within the said receptacle, the eyes, in which instance being, of course, of a greater area than the width of the hooks. The clean towels are arranged upon the horizontal portion 7 of the rack, and as each of the towels are used the one nearest the curved or goose-neck arms 9 is brought over the said arms and after being used is allowed to drop by gravity until the same is deposited upon the closed ends of the arms.

From the above description taken in connection with accompanying drawing, the simplicity of the device, the sanitary result produced thereby, as well as the many other advantages of the structure will, it is thought commend themselves to those skilled in the art to which such inventions appertain without further detailed description. It is to be understood, however, that the device is not to be limited in its connection with the cabinet and receptacle shown and described, and that the device may be employed in schools, stores, barber shops and public places.

Having thus described the invention, what I claim is:—

In a device for the purpose set forth, in combination with a divided receptacle, a towel rack, said rack being constructed of a single piece of material and embodying a longitudinal member which is arranged centrally below the cabinet, vertical members which are secured to the opposite sides of the cabinet, inturned longitudinally extending members which overlie the open top of

the compartments and which are arranged directly above the first named member, upper and outwardly curved members which have inturned sides and which terminate in
5 substantially vertical members, and the terminals of the last named members being each provided with hooks.

In testimony whereof I affix my signature in presence of two witnesses.

THOMAS KING TAYLOR.

Witnesses:

MURVIN A. PUTNAM,
MARY E. V. TAYLOR.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "9"

Patent to L. Straub, September 17, 1912, No. 1,038,984

L. STRAUB.
TOWEL RACK.

APPLICATION FILED DEC. 22, 1911.

1,038,984.

Patented Sept. 17, 1912.

Fig. 1.

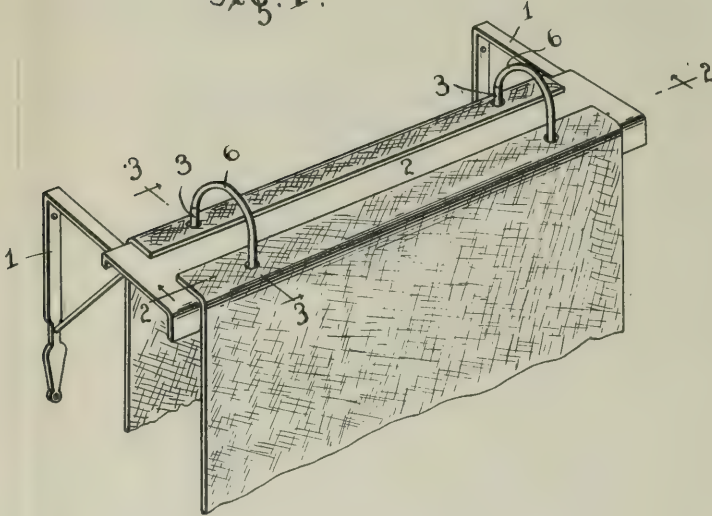


Fig. 2.

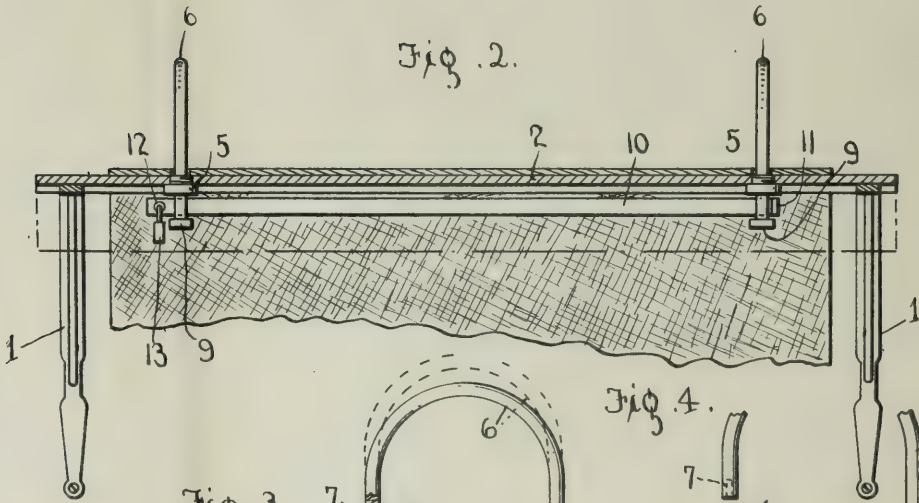


Fig. 3.

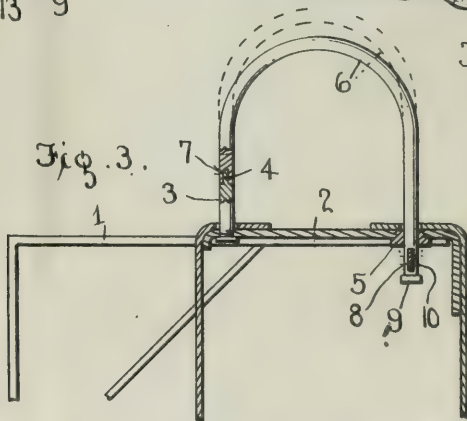
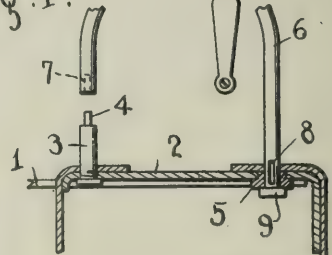


Fig. 4.



Inventor

Louis Straub

Witnesses

L. B. James
C. E. Hunt

by *A. B. Wilson & Co.*

Attorneys

UNITED STATES PATENT OFFICE.

LOUIS STRAUB, OF DENVER, COLORADO.

TOWEL-RACK.

1,038,984.

Specification of Letters Patent.

Patented Sept. 17, 1912.

Application filed December 22, 1911. Serial No. 867,276.

To all whom it may concern:

Be it known that I, LOUIS STRAUB, a citizen of the United States, residing at Denver, in the county of Denver and State of Colorado, have invented certain new and useful Improvements in Towel-Racks; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to improvements in towel racks.

One object of the invention is to provide a towel rack having means whereby a supply of clean towels may be securely fastened thereto in such manner as to permit the same to be successively swung around into position for use.

Another object is to provide a rack of this character having means whereby the towels hung thereon will be securely fastened or locked against removal from the rack.

With these and other objects in view, the invention consists of certain novel features of construction, and the combination and arrangement of parts as will be more fully described and claimed.

In the accompanying drawings; Figure 1 is a perspective view of my improved towel rack; Fig. 2 is a vertical sectional view on an enlarged scale taken on the line 2—2 of Fig. 1; Fig. 3 is a cross sectional view thereof taken on the line 3—3 of Fig. 1 and showing in dotted lines the open position of the towel fastening member; Fig. 4 is a similar view showing one of the towel fastening members in a released and open position to permit the towel to be applied to or removed from the rack.

My improved towel rack comprises a pair of brackets 1, which may be secured to a wall or other suitable support and to the upper arms or members of which is secured a towel receiving plate 2 having its outer and inner edges bent downwardly at an angle to form supports for the towels hung thereon. The plate 2 is secured to the outer portions of the upper bars of the bracket and is spaced a sufficient distance from the wall or other support to which the brackets are secured to permit the towels to be readily reached and swung from the inner to the outer edge of the plate as will be hereinafter more fully described.

In order to hold the towels in position and to securely fasten the same to the rack, I

provide towel holding members comprising studs 3 secured in the plate 2 near the ends thereof and adjacent to the inner edge of the same as shown. The upper ends of the studs are reduced to form pins 4. In the plate 2 near the front or outer edge thereof and in line with the studs 3 are arranged bushings 5 preferably provided with heads or enlarged outer ends and having a threaded engagement with the apertures in the plate as shown. Slidably engaged with the bushings 5 are the bail shaped outer sections 6 of the towel fastening members. The inner ends of the bail shaped members 6 are considerably shorter than the outer ends and in said inner ends are formed sockets 7 with which the pins 4 on the studs 3 are engaged when the members are in operative position. The lower ends of the sections 6 extend a suitable distance below the bushings 5 with which they are engaged and in the projecting lower ends of said sections are formed slots 8 while on the extremities of the projecting ends are formed heads 9.

Adapted to be engaged with the slots 8 in the projecting ends of the sections 6 is a locking bar 10 having on one end a head or offset lug 11 which forms a stop and prevents this end of the bar from being pulled through the slots 8. In the opposite end of the bar is formed a lock receiving aperture 12 with which is adapted to be engaged a padlock 13 whereby the bar 10 is locked against removal. When the bar 10 is engaged in the slots 8 the bail shaped sections 6 of the towel fastening members will be securely locked and the sockets 7 in the shorter end thereof held in engagement with the pins 4 in which position the studs 3 and sections 6 will form practically continuous bail shaped bars or rods for receiving and holding the towels in engagement with the rack.

In using my improved rack any desired number of towels are hung upon the studs 3 after the members 6 have been lifted to the position shown in dotted lines in Fig. 3 and in full lines in Fig. 4, said towels being provided with eyelets or holes to receive the studs 3. After the clean towels have thus been hung upon the studs the sections 6 are drawn down into engagement with the studs and said sections fastened and locked in the manner described. After thus securing the clean towels they may be successively swung around from the studs 3 over the bail shaped

sections 4 to an operative position wherein they will be suspended from the rack by the outer sections 6 of the holding members. In thus arranging the towels when one towel has become soiled another may be quickly swung around in position so that each successive person having occasion to use the towels may readily supply himself with a clean towel by swinging one of the latter around over the bail shaped holding members from the rear to the front side of the rack as will be readily understood.

By providing the heads 9 on the lower ends of the sections 6, the latter are prevented from being pulled upwardly to a sufficient extent to entirely disengage the lower ends thereof from the bushings 5. The bushings 5 are provided to form a more substantial connection between the bail shaped sections 6 of the holding members and the adjacent parts of the towel supporting plate 2 and also to relieve the edges of the openings in the plate from wear which would occur from the movement of the sections 6 if they were engaged directly in the openings in the plate.

From the foregoing description taken in connection with the accompanying drawings, the construction and operation of the invention will be readily understood without requiring a more extended explanation.

Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advantages of the invention as claimed. 35

Having thus described my invention, what I claim is:

A towel rack comprising a flat plate having its opposite longitudinal edges bent downwardly to form towel engaging ledges, means for rigidly supporting the plate in a horizontal position, studs secured adjacent to one edge of the latter, the upper ends of which are reduced to form pins, bails movably mounted upon the plate one end of which are provided with sockets to receive the pins of the studs, a locking bar slidably and detachably located in slots in the lower ends of the bail adjacent the head thereof, whereby when the bar is withdrawn from the slots the bail can be elevated and turned to expose the pins of the studs, and means for holding the bar to prevent longitudinal movement thereof. 40 45 50 55

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

LOUIS STRAUB.

Witnesses:

FRANK H. SPENCER,
MICHAEL A. SWEENEY.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "7"

Patent to Guy Reid, July 15, 1913, No. 1,067,622

G. REID.
 COMBINED TOWEL HOLDER AND LOCK.
 APPLICATION FILED JULY 18, 1912.

1,067,622.

Patented July 15, 1913.

Fig. 1.

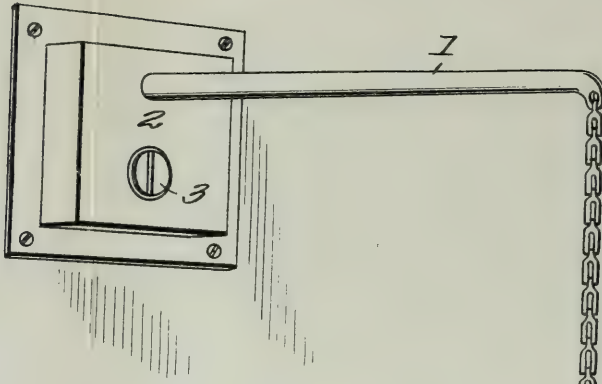


Fig. 2.

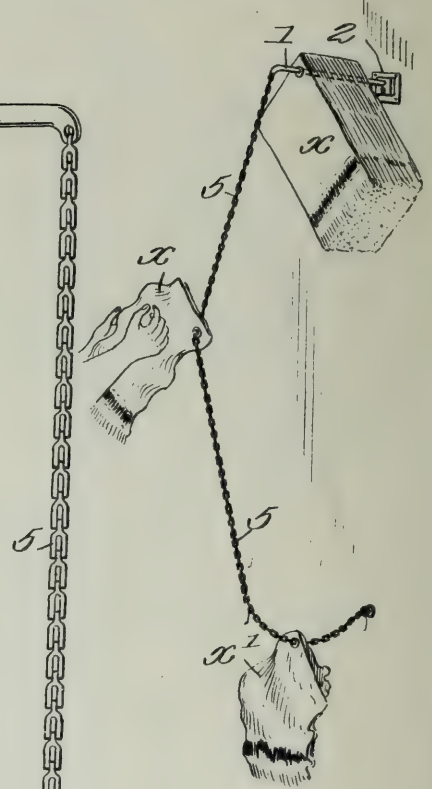


Fig. 3.

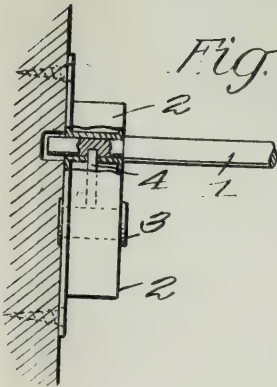
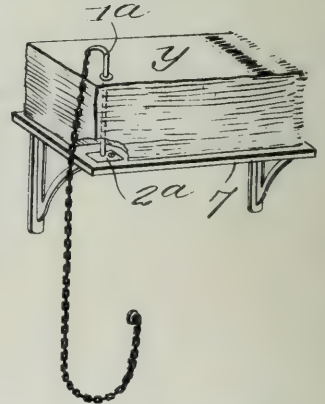


Fig. 4.



WITNESSES
A. E. Wade
Amos H. Kent

INVENTOR
 GUY REID
 BY *Miner*

ATTORNEYS

UNITED STATES PATENT OFFICE

GUY REID, OF OSAGE CITY, KANSAS.

COMBINED TOWEL HOLDER AND LOCK.

1,067,622.

Specification of Letters Patent.

Patented July 15, 1913.

Application filed July 18, 1912. Serial No. 710,294.

To all whom it may concern:

Be it known that I, GUY REID, a citizen of the United States, and a resident of Osage City, in the county of Osage and State of Kansas, have invented an Improved Combined Towel Holder and Lock, of which the following is a specification.

As is well known, the surreptitious abstraction of towels in hotels involves a considerable financial loss to the proprietors, and I have devised an improved means for holding and securing towels in toilet and other rooms in such manner as to prevent their removal without interfering with their convenient use. To these ends, I provide the towels with metal eyelets and string them on a bar or rod which is supported in, and locked to, a fixed support, and to whose outer end a chain is attached, the other end of the latter being secured to a wall staple or ring. The towels are normally held on the bar or rod, but may be slid off and down on the pendent chain so as to be conveniently used, the soiled towel hanging on the loose portion of the chain.

In the accompanying drawing Figure 1 is a perspective view of my invention. Fig. 2 is a perspective view illustrating the practical use of the same. Fig. 3 is a detail view partly in section illustrating the connection of the towel-supporting bar or rod with a locking support. Fig. 4 is a perspective view illustrating a modification.

I will first describe the invention as illustrated in Figs. 1, 2, and 3. A horizontal bar or rod 1 is inserted in a support consisting of a lock case 2 which is secured by screws, or other means, to a vertical fixed object, say a wall or a window frame. The rod passes through the lock proper 2, and the latter is provided with a rotatable device 3 adapted for operating a tumbler or locking bar 4 which is adapted to engage a notch in the bar, as shown in Fig. 3. By inserting a key in the rotatable device 3, the bar or rod 1 may be unlocked and withdrawn from the support, when it is required to remove or apply towels.

In Fig. 2, a number of towels x is shown hanging from the bar or rod 1, it being understood that the several towels of the pack have been first arranged with the holes, which are near one corner, in the desired coincidence, and the bar or rod 1 inserted

through them and then engaged with the locking support 2.

A chain, or wire rope, 5 is attached to and pendent from the free end of the towel-support 1, and its lower end is permanently secured to a wall staple or ring 6. As shown in Fig. 1, the lower end of the chain is carried upward to the point of attachment 6, thus forming a loop from which the soiled towels x' depend, as indicated in Fig. 2.

It will be understood that, when a towel is required for use, it is pulled off the bar or rod 1 and drawn down on the chain, as indicated in Fig. 2, and then, after using, it is allowed to fall and descend by gravity to the position indicated at x' . This operation is repeated as often as a towel is desired, until the supply is exhausted, when the bar or rod 1 is unlocked and the soiled towels drawn off the chain and rod and a fresh pack is applied and suspended, like the former ones, in the manner shown in Fig. 2.

In the modification shown in Fig. 4, a number of towels y is applied to a bar or rod 1^a which is arranged vertically instead of horizontally, as in the first case, the locking device 2^a being secured to a shelf 7 supported horizontally on wall brackets. In other respects the construction and operation are precisely the same as before described. In other words, as shown in Fig. 4, the towels are supported on the shelf 7 instead of hanging directly from a rod or bar passing through them. This, of course, relieves the towels from strain and is in some respects more advantageous.

What I claim is:—

The improved apparatus for holding towels and securing them while permitting their use, the same comprising a chain, a fixed wall-ring to which one end of the chain is attached, a lock fixed to the wall above said ring, a rod adapted to enter and detachably engage said lock and extending therefrom to such length as adapts it to serve as a towel holder, the free end of the rod being connected with the chain which depends therefrom, as shown and described.

GUY REID.

Witnesses:

D. A. RAMSEY,
JAS. HEPWORTH.

APPELLANTS' (DEFENDANTS') EXHIBIT "8"
Patent to Heins & Galland, November 11, 1913, No. 1,078,501

T. HEINS & E. R. GALLAND.
TOWEL RETAINER.
APPLICATION FILED JULY 24, 1912.

1,078,501.

Patented Nov. 11, 1913.

Fig 1

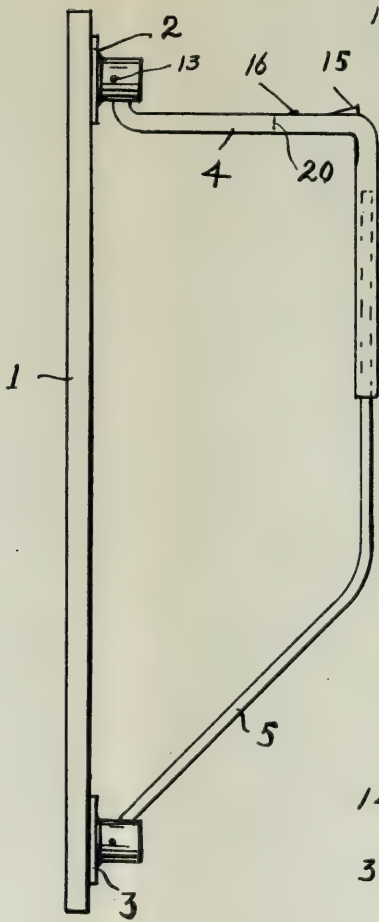


Fig 2

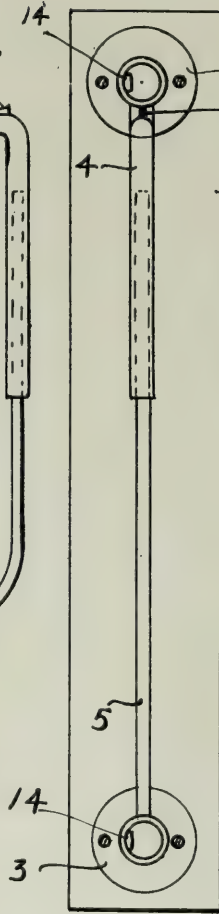


Fig 3

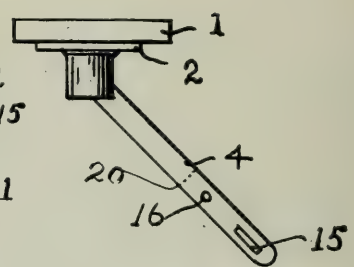


Fig 4

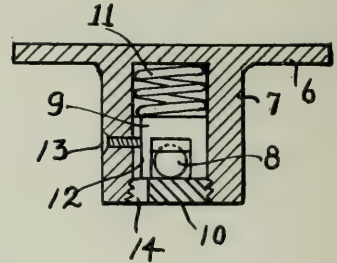


Fig 5

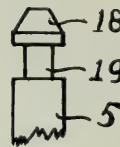


Fig 6

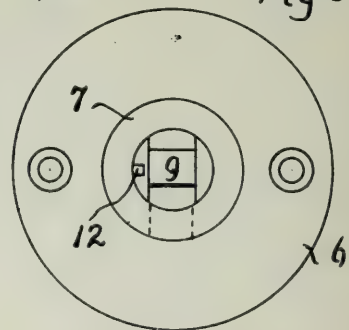
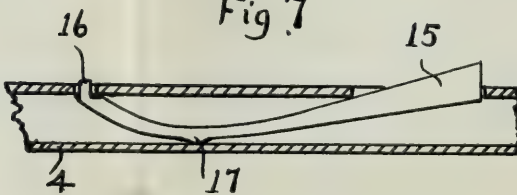


Fig 7



WITNESSES:

H. B. Clark
A. H. Kephart

INVENTORS

E. R. GALLAND AND T. HEINS.

BY
Carlos P. Griffin
ATTORNEY

UNITED STATES PATENT OFFICE.

THEODORE HEINS AND EDWARD R. GALLAND, OF SAN FRANCISCO, CALIFORNIA.

TOWEL-RETAINER.

1,078,501.

Specification of Letters Patent.

Patented Nov. 11, 1913.

Application filed July 24, 1912. Serial No. 711,348.

To all, whom it may concern:

Be it known that we, THEODORE HEINS and EDWARD R. GALLAND, citizens of the United States, residing at San Francisco, in the county of San Francisco and State of California, have invented a new and useful Towel-Retainer, of which the following is a specification in such full and clear terms as will enable those skilled in the art to construct and use the same.

This invention relates to a towel retainer and its object is to provide means whereby a supply of fresh towels may be left in a restaurant, saloon, or office, while at the same time, an individual towel is provided for each person, but which towel cannot be removed from the retainer, thus preventing the loss of towels.

It will be understood by those skilled in the art that it is common for office and restaurant supply laundries to furnish a given number of towels per week for the use of patrons. These towels are usually left in a cabinet loose and inevitably disappear in larger or smaller numbers, which disappearance is avoided by the use of the retainer herein disclosed.

In the drawings in which the same numeral of reference is applied to the same portion throughout the several views, Figure 1 is a side elevation of the retainer complete, Fig. 2 is a front elevation of the retainer, Fig. 3 is a plan view of the retainer. Fig. 4 is a horizontal sectional view of one of the brackets for holding the towel support, Fig. 5 is a view of the end of one of the towel supports showing a groove therein for locking said support in place, Fig. 6 is a front elevation of one of the brackets for holding the towel support with the rock retainer removed therefrom, and Fig. 7 is a sectional view on an enlarged scale showing a portion of the towel supporting tube and showing the catch used to prevent the towels from falling off the support.

The numeral 1 represents a board to which the towel supporting brackets 2 and 3 are secured and which board is intended to be secured to the wall where the towels are to be used. The brackets 2 and 3 are suitably secured to the board by means of screws. The brackets support a tube 4 and rod 5 respectively, the rod 5 extending into the tube 4 far enough to prevent its removal therefrom, while at the same time, enough movement is

permitted to allow the tube 4 to slip down far enough to be removed from the bracket 2.

The supporting brackets comprise a flat disk-like portion 6, from which disk a hollow boss 7 extends. The hollow boss has an opening 8 therein through which the tube or rod, as the case may be, may be inserted. Slidable within the hollow boss is a lock 9, said lock being held against the retaining plug 10 by means of a spring 11. The lock has a slot 12 in one side and a screw 13 is passed through the boss to prevent the lock from rotating out of the proper position. The plug 10 has a slot 14 therein for the insertion of a key to push the lock 9 back out of engagement with the rod or tube as the case may be.

In order to retain the towels upon the upper portion of the tube 4, a spring catch 15 is used. This catch has a portion 16 extending through a small hole in the tube 4, and it has a small projection at 17 to bear against the bottom of the tube and thus give the necessary spring to the catch.

Both the tube and the rod have the ends thereof, which are inserted in the brackets, beveled, as shown at 18 and each of them has a groove as shown at 19 for the lock to pass into to secure the tube and rod in place. In order to strengthen the tube 4, it has a rod inserted therein which terminates at the dotted line indicated at 20. It will be understood that any suitable form of lock may be used for securing the rod and tube in their proper places.

In use a considerable number of towels are placed upon the upper portion of the tube 4, each towel having a suitable gromet placed in one corner thereof for hanging the towels on the tube. When used the first towel is pulled down over the latch and after being used is dropped down on the rod 5 out of the way, a fresh towel being ready for the next user.

The towel support may be turned from side to side, it being indicated in Fig. 3 as turned from the right of the supporting bracket so that the support occupies as little space as possible.

Having thus described our invention what we claim as new and desire to secure by Letters Patent of the United States, is as follows:

1. A towel retainer comprising a support, brackets carried thereby, a towel supporting

rod having a horizontal portion and a downwardly extending portion, means to lock said rod to the brackets and to permit said rod to be turned about an axis parallel to the support and passing through the brackets, and means to loosely retain the towels upon the substantially horizontal portion of the rod, substantially as described.

2. In a towel retainer, a support, two brackets carried thereby, a jointed rod supported by said brackets and movable about an axis and passing through both of said brackets, means to lock the ends of the rod

to the brackets, and a spring catch carried upon the upper portion of the rod to loosely retain towels placed thereon, substantially as described.

In testimony whereof we have hereunto set our hands this 17 day of July A. D. 1912, in the presence of the two subscribing witnesses.

THEODORE HEINS,
EDWARD R. GALLAND.

Witnesses:

C. P. GRIFFIN,
L. H. ANDERSON.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

BROADWAY TOWEL SUPPLY
COMPANY, a corporation, and
Amos Burg,

Appellants,

vs.

BROWN-MEYER COMPANY, a
corporation,

Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

APPELLANTS' BRIEF.

T. J. GEISLER,
of Counsel for Appellants.

JOSEPH L. ATKINS,
of Counsel for Appellee.

*In the District Court of the United States for the
District of Oregon.*

Broadway Towel Supply Company, a corporation,
and Amos Burg,

Appellants.

vs.

Brown-Meyer Company, a Corporation,

Appellee,

No. 2971.

APPELLANTS' BRIEF

This was a suit by the above named appellee, as plaintiff, against the above named appellants, as defendants, to recover for the infringement of a patent.

This appeal presents two main questions—the first arising on the interlocutory decree adjudging that the device complained of infringes the patent in suit; and the second arising on accounting before the Master, after the interlocutory decree, viz.:

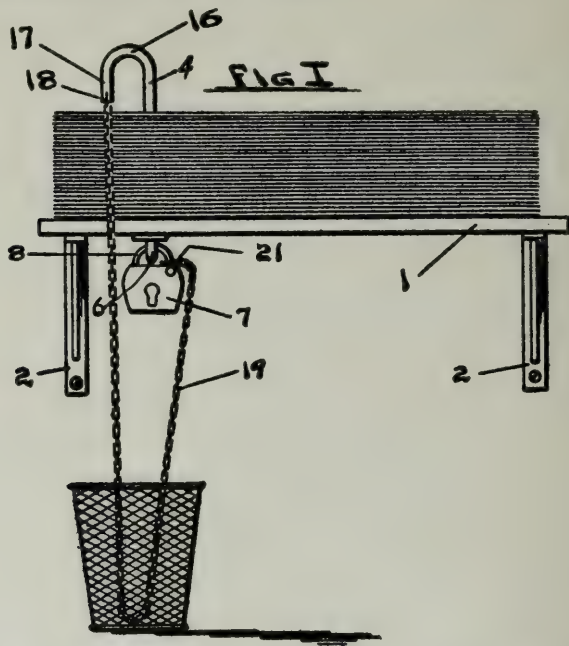
First: Is infringement to be judged upon the *actual arrangement and use* of the device in question, or upon how it *might* be arranged and used?

Second: Is the patentee of a mere *improvement* of an *old* combination obliged to establish the benefits attributable to his improvement, and *restricted* to such in his recovery?

The patent in suit is that granted to C. F. Brown November 3, 1914, No. 1,115,895, for a Towel Holder, on an application filed August 13, 1913; and he had assigned his entire interest to the Brown-Meyer Company, the appellee.

A copy of this patent is to be seen in the "Appendix of Documentary Evidence" in the Transcript of Record following page 123.

The following "Fig. 1" from the Brown patent drawing shows the whole idea.



The parts of this device Brown termed as follows: 1, a supporting *shelf*; 2, *brackets* thereof; 4, the *assembling member*, or post, rotatably supported on the shelf 1 and made with a crooked head as at 16. The towels in use are strung on the towel-stringing chain or "*flexible retaining member*" 19, which is secured at its upper end, 18, to the crooked top-end of the assembling member 4, and is provided at its lower end with an *eyelet* 21 by which it is fixed on the *shackle* 8 of the *padlock* 7.

The questions propounded require no extensive examination of the record of this cause.



THE DOMINANT FACTS

may be briefly stated as follows:

Both appellants and appellee conduct laundries in the city of Portland, and are particularly engaged in furnishing towels for use in the lavatories of public buildings, and other places.

For sanitary reasons the idea had been conceived of supplying individual towels in public places. In the city of Portland such was required by an ordinance.

Experience showed that if the individual towels were supplied loose, a considerable number would be lost. Hence inventors sought to provide a towel-rack which would allow a fairly convenient use of the towels, but at the same time tie them in place.

As far as the record shows, the subject had received the attention of inventors since 1896.

Brown adopted bodily a prior patented device (as will presently be shown) to which he added a functional improvement.

The appellee used its device publicly for some time prior to the issuance of said Brown's patent, and being a fairly convenient device, appellant company adopted it, not knowing that it was being patented.

The device which appellants were using on November 3, 1914, is shown by the cut opposite this page.

As well known, Patent Office proceedings are confidential; and of course appellants could not be charged with notice of the Brown patent until its issue Novem-

ber 3, 1914, and the further time required by mail for bringing actual notice to Portland, Oregon.

In fact the first actual notice which appellants had of said patent was a letter received from appellee's attorney in the early part of November, 1914. (Trans. 87, 92.)

Immediately after receiving such letter, Burg, of appellants, called on inventor Brown about the matter, and was referred to the latter's attorney. There were further interviews between Burg and Brown, and his attorney (Trans. 88), but these lead to nothing.

Then appellants consulted an attorney who procured the record, i. e., the "File Wrapper" of the Brown patent. When the File Wrapper had been examined appellants were advised by their counsel that the device they were then using infringed the Brown patent, but such infringement could be avoided by changing the arrangement of the towel-stringing chain; and thereupon appellant's device was re-arranged as shown in the following cut:

Note that the lower end of the towel-stringing chain (19) of the Brown device is attached to the lower end of the towel-assembling post (4), while in appellant's rack, *after its change*, above illustrated, the lower end of the chain was permitted to hang down into, and fastened to the bottom of a basket.

Appellants were advised by their counsel that the file wrapper showed a device prior to Brown, invented by one Reid, which they might follow by making the



change stated, and thus avoid infringement of the Brown patent.

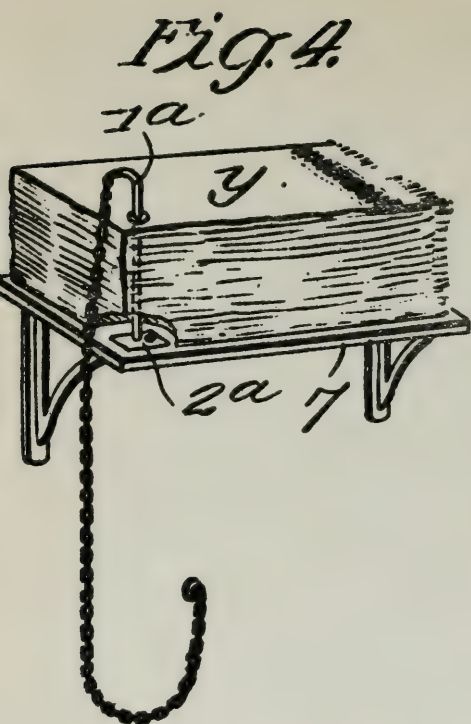
The File Wrapper of Brown's patent disclosed the following facts:

When Brown filed his application, a number of patents had already been issued for towel racks, directed to the same general purpose Brown had in mind; and these patents were cited by the Examiner of the Patent Office in the prosecution of Brown's application. All such patents are contained in said "Appendix of Documentary Evidence," but it is only necessary to deal with a few of them.

The most important—really the progenitor of all the essentials of the Brown device—is the patent of *Guy Reid* issued July 15, 1913, No. 1,067,622, entitled "Combined Towel Holder and Rack."

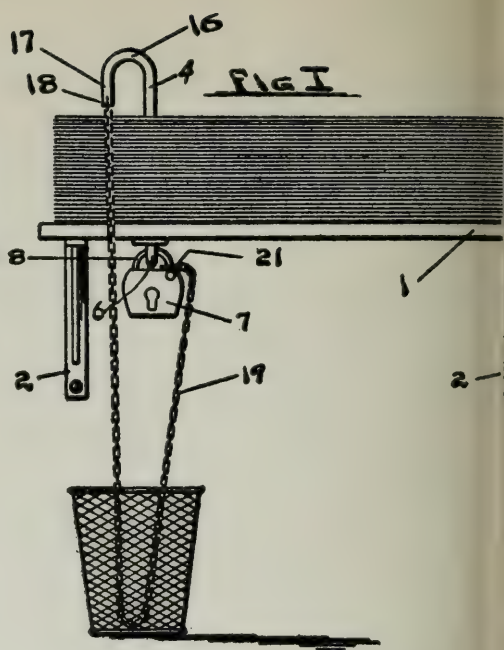
It is to be noted that the application for said Reid patent was filed about a year before the Brown application; and Brown in his amendatory letter of Feby. 19, 1914, to the Patent Office (See *File Wrapper*, Trans. p. 109) *admitted that the application on his own improvement was drawn in view of the disclosure of this Reid patent.*

A clear idea of the bearing of the Reid device on the Brown device is readily obtained by placing Fig. 4 of the drawing in the former patent side by side with Fig. 1 of the drawing in the later Brown patent, as here done.



The earlier Reid Device as shown in his patent drawing, Fig. 4.

7 is a shelf on which is mounted a rod 1^a secured to the shelf by a locking device 2^a. y represents the number of towels placed on the rod or towel assembling post 1^a.



The later Brown Device as shown in his patent drawing, Fig. I.

1 is the supporting shelf, 2, the brackets therefor, 4 the assembling member or post, 16 the crooked head of the latter to the dependant end 17 of which the upper end 18 of the chain 19 is attached, the lower end of the chain being provided with an eyelet 21 for fastening on the shackle 8 of the padlock 7.

A parallel statement of excerpts from the printed specifications of these two patents, as here given, will also aid their understanding.

The REID PATENT,
dated July 15, 1913.

* *

"As well known, the surreptitious abstraction of towels in hotels involves a considerable financial loss to the proprietors, and I have devised an improved means for holding and securing towels in toilets and other rooms in such manner as to prevent their removal without interfering with their convenient use. To these ends I provide the towels with metal eyelets and string them on a bar or rod which is supported in, and locked to a fixed support, and to whose outer end a chain is attached, the other end of the latter being secured to a wall staple or ring. The towels are normally held on the bar or

The BROWN PATENT,
dated Nov. 3, 1914.

* *

"My invention relates to towel holders, and has for its object the production of a device for holding and preserving in order an assemblage of clean towels. * *

A further object of the invention is to provide means for conveniently withdrawing the towels one by one from the pile, for facilitating the manipulation of it while in use, and for securing it against accidental displacement or intentional or unauthorized removal after use." (Printed specification Brown patent, lines 9 to 24, page 1.) * * *

"The rigidity of the assembling member (4), which is preferably made a feature thereof, serves to

rod, but may be slid off and down on the pendant chain so as to be conveniently used. The soiled towel hanging on the loose portion of the chain.” (Page 1, lines 8 to 25 of Reid printed specification.) * * *

“When a towel is required for use it is pulled off the bar or rod 1a and drawn down on the chain, * * * and then, after using, it is allowed to fall and descend by gravity * *” (Ib lines 65 to 69, page 1.)

secure the clean towels in place upon the shelf, while the flexibility of the retaining member, constituting as it does in fact a continuous extension of the assembling member, provides for the widest latitude of manipulation of individual towels in use.” (Ib, lines 90 to 98, p. 2.)

The claims in the Brown patent read:

1. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for securing both ends* of said retaining member to the assembling member.

2. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for*

detachably securing both ends of said retaining member together.

3. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end of the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member.

4. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

An examination of the history of this patent, as furnished by the File Wrapper, will show that the novelty in these combinations alone resides in the particular functional arrangement of the towel stringing chain, set forth in such claims, for:

The crooked towel-assembling member—by which a horizontally stacked batch of towels may be lifted up, clear of the supporting shelf—was previously shown in the design patent to J. Rouso, No. 42398, granted April 9, 1912; also in the patent to L. Straub, No. 1,038,984, granted Sept. 17, 1914. The latter also shows the crooked towel-assembling member as *rotatably* supported on a shelf.

And the combination of a shelf, a crooked towel-assembling member or post, and a chain-like or "flexible towel-retaining member" is shown in said patent to G. Reid, No. 1,067,622, granted July 15, 1913. The latter really is the prototype of all the essentials of the Brown device, and differs only therefrom in that it does not have the same functional arrangement of its chain, 5, as the chain, 19, of the Brown device.

When Brown filed his application he made the following *additional claims*, (see File Wrapper, Trans. p. 105) which were *rejected and cancelled*:

1. In a towel holder or the like, the combination with a movable supporting member, of a flexible towel retaining member secured in its entirety thereto.

2. In a towel holder or the like, the combination of a movable supporting member, of a flexible towel-retaining member, and means for detachably securing the latter in its entirety to the former.

5. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member co-operative with said assembling member.

6. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member carried by said assembling member co-operatively with said supporting member.

7. In a towel holder or the like, the combination with a supporting member provided with a socket, of an

assembling member mounted in said socket, and a retaining member detachably secured to the assembling member.

8. In a towel holder or the like, the combination with a supporting member provided with a socket, of an assembling member mounted therein, a retaining member carried by the assembling member, and common means for securing the retaining member to the assembling member and the assembling member to the supporting member.

11. In a towel holder or the like, the combination with a supporting member, of a towel assembling member provided with a threading point, and means for operatively uniting said members, substantially for the purpose specified.

An analysis of the claims in the Brown patent brings out the fact that each of the combinations set forth in its broadest aspect consists of these elements:

1. A shelf.
2. A post-like "towel assembling member" supported (rotatably or otherwise) by the shelf.
3. A chain or flexible towel-retaining member—this chain being secured at its top end to the towel assembling post.
4. Means (specifically a padlock) for detachably securing the lower end of the chain to the lower end of said post.

In the play of language used in claim 1 of the Brown patent, the padlock is defined as:

“means for securing both ends of said retaining member (chain) to the assembling member (post).”

And in claim 2, as:

“means for detachably securing both ends of said retaining member together.”

These latter designations of the Brown chain, with respect to its particular arrangement, is somewhat obscure, but is aided by the explanation contained in Brown's amendatory letter of Feby. 19, 1914, in which he states to the Examiner (Trans. 110) “Let it be noted that in applicant's construction his assembling member (the post) constitutes an elongated link of special function in the retaining member (the chain).

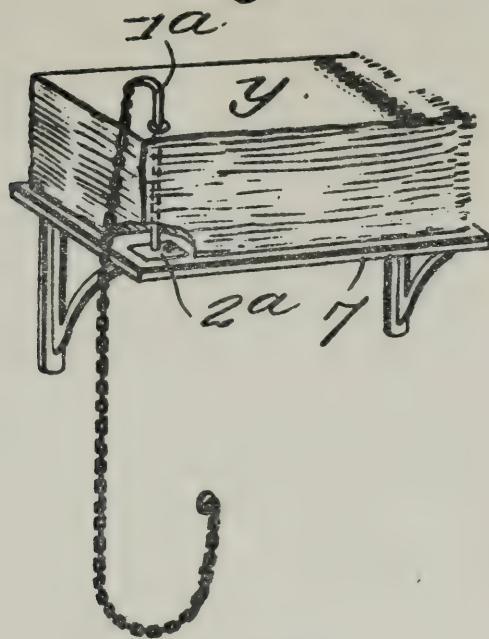
But we need not bother with this refinement of language and just get down to “brass tacks” as it were.

Here again, for convenience, are given comparative views of the devices patented to Reid and Brown.

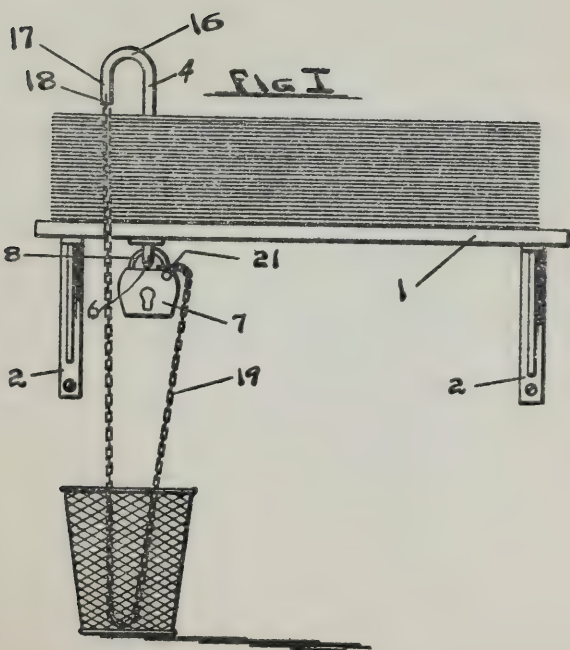
And applying the simple process of subtraction of the former from the latter, we see that the substance of the Brown invention is the rearrangement of the towel-stringing chain of the prior Reid patent, so that the lower end thereof is attached to the lower end of the towel-assembling post, directly under the shelf, instead of to a point below the shelf, as in the Reid device.

It is to be noted that Brown tried to secure, but it was denied him, claims not including said particular feature for see said rejected and cancelled claims 5 to 8 and 11 above referred to.

Fig. 4.



REID DEVICE



BROWN DEVICE

It is further to be noted that in each of the four claims of the Brown patent, *the flexible member—the chain—has a particular FUNCTION ascribed to it.* Thus in claim 1 the particular arrangement of this chain is stated to be “for the purpose specified,” i. e. in the specification, in which we are told (see printed copy of Brown’s patent, p. 2, lines 96 to 98) that it “provides for the widest latitude of manipulation of the individual towels as illustrated in Fig. II of Brown’s patent. In his amendatory letter of July 23, 1914, (Trans. 116) Brown further amplifies this function of the particular arrangement of his chain as follows:

“The combination described in claim 3 (being claim 1 of the patent) defines a special construction and a distinct utility. It is this, in the Reid device, as shown partly in Figure 2, each individual towel must be used in close proximity to the other towels, clean and soiled, upon the holder. Of course, it may be said that this situation may be relieved by increase of length of chain. But this does not meet the situation. To increase the length of chain beyond certain limits is impracticable, would tend to defeat the purpose of the device, in the kinking of the chain, for example. Applicant has devised means for obtaining the maximum availability of each individual towel in use without impairment of the certainty of operation of the device.”

From the foregoing analytic examination of Brown’s patent, it is obvious that the margin of patentability of his alleged improvement over the prior Reid device was exceedingly small.

But appellants did not concern themselves with that question. True, they did not want to be deprived of their rights, yet they decided to avoid infringement of whatever patent appellee had. They promptly changed their device, as mentioned, and offered to settle on any reasonable basis for the month's prior infringement (Trans. 33, 36).

Referring again to the arrangement and operation of appellant's device, after changed as above illustrated, it is to be noted that this device did not then embody the crucial and dominant element of the Brown patent, for *it did not embody a chain—or flexible retaining member as Brown terms it—having both ends secured to the towel assembling post.* And appellants contended that they no longer infringed. But appellee disputed appellants' contention; appellee claiming that appellants' device, notwithstanding said changes, still infringed, because it still embodied "*means by which this device MIGHT be rearranged and then used like the Brown device.*"

This suit then followed. The evidence taken therein developed the facts above stated.

It was conceded on the trial, also on the accounting before the Master (Trans. 30, 82), that appellants' device, after its said change, was used only with the lower end of the towel-stringing chain hanging down and fastened to the bottom of the basket, and that the lower end of the chain was not fastened to the lower end of the assembling member, or post.

The District Court in finding in the affirmative on the question of infringement, reached conclusions clearly erroneous, it is submitted, as shown by the following excerpts from its opinion: (Trans. 45-6-7)

"The claims of the complainant's patent, it must be conceded, are subject to narrow construction. * * *"

"The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance."

"* * * I am not persuaded that the simple means of attaching the chain or retaining member to the bottom of the basket on the inside instead of at the foot of the assembling member, varies the device to such an extent as *to add a new discovery*, or even an old element, to the combination. The complainant's device is so constructed that the basket may be used in connection with it as a depository for the soiled towels. The defendants' device simply makes the basket a depository and merely changes the place of attachment for the lower end of the chain or retaining member. As an illustration, in the Reid patent, the lower end of the chain is attached to a wall, and yet the patent to complainant's assignor was granted notwithstanding the prior patent of Reid. *Now suppose that the defendant had used the Reid patent and simply detached the chain from the wall and attached it to the bottom of the basket and used the basket as a depository for the towels, could any one say*

that such change constituted an added discovery or new element to the Reid patent? The Reid retaining member could have been used by elongating the chain so as to drop the sag into a basket and thereby bring the basket into play as a depository as the complainant uses a basket."

"Thus I cannot conceive that the detachment from the lower end of the assembling member in the Brown patent and attaching it to the bottom of the basket or depository is the adding of a new element or discovery to the defendants' device, and am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement."

Manifestly the defense of appellants was erroneously conceived by the lower court, and it is not controlled by any such rule of law as suggested by the opinion.

The defense of infringement in the Answer was stated as follows: (Trans. p. 9, 10, 11)

"That the alleged invention of said Charles F. Brown related to towel holders designed for supplying individual towels to users, and that this was a well and highly developed art before said Brown entered into the field, with his said alleged improvement, as is shown by the following patents: (here are stated the patents cited by the Patent Office against Brown's application as originally presented.)

"That, therefore, the alleged improvement of said Brown, if it did constitute an invention, was of a very specific and limited character, and must be construed

accordingly in order not to encroach upon the rights which were vested in the general public prior to, and at the time said Brown entered said field."

"That the defendants admit that they made and used a few towel holders embodying the features set forth in said claims of said alleged letters patent, but such making occurred some time before said letters patent were issued, and before the defendants had any knowledge of said Brown's alleged invention, or that said letters patent were to be issued therefor; and immediately after the defendants were informed of said letters patent, they notified the plaintiff that they would discontinue the use of towel holders embodying features covered by said letters patent; and did thereupon proceed immediately to change over their said towel holders so that same would, and did, not infringe upon said letters patent."

The change so referred to was the arranging of the towel stringing chain in the same manner as shown in said patent to Reid, which was prior to Brown's invention, and which appellants had as much right to use as appellee.

After the entry of the interlocutory decree and during the accounting before the Master, appellants sought to introduce into their defense, by supplemental answer, two additional patents, of which they had no knowledge when they filed their original answer, but both very material, in this, one of such patents apparently dominates the Brown patent, and therefore appellants' apparent liability under such dominating patent should be taken

into consideration on accounting; and the other patent bears directly on the patentable novelty of the Brown invention, in view of the construction which appellants insisted on placing on and the court's construction of the Brown claims.

As to these matters it is sufficient to refer to the record: Trans. 51, 60.

The court denied appellants leave to file such supplemental answer, and on accounting the Master refused to permit any proof of said alleged dominating patent.

On accounting the Master found: (Master's Report Trans. 64)

I.

"The particular towel rack covered and protected by the letters patent was not manufactured and sold by either complainant or defendant, and therefore there is no account of profits made by defendants or lost by complainant.

II.

"Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license.

III.

"The evidence shows in actual practice the towel rack in question was a device to permit the ordinary use of individual towels and at the same time protect the laundry from losses by theft."

He further found: (Trans. p. 66)

“The Broadway Towel Supply Company furnished under the circumstances already detailed the number of towels stated, viz., 446,858, and the total receipts therefor was \$1,340.50. Of this amount the proof shows 25 per cent, or one-quarter, was profit, or \$335.00.”

The Master in his report also says: (Trans. 63)

“Defendants (appellants) * * * insist that the Master should determine * * what proportion of the towel rack is covered and protected by the letters patent. *The Master* believes and *holds* * * * *the plaintiff (appellee) is entitled to recover its damages without any attempt by the master to segregate or apportion the amount of such damages resulting from the use of any particular portion or element of the towel rack protected by the letters patent.*”

“And as a conclusion of law (Trans. p. 67) that the complainant is entitled to recover of defendants Broadway Towel Supply Co. and Amos Burg the sum of \$335.00, together with costs and disbursements.”

Due exceptions were taken to the master's report (see Trans. 86-90) to the effect:

I (b) That under the facts of the case and findings of the master, the only benefit which appellants received from the towel rack used by them was a saving in the loss of towels. That the only testimony as to the probable loss, *if no rack were used*, fixed such loss at approximately 50% (Trans. 87). That the 446,858 towels used by appellants in its service represented an investment of \$385.00, and a 50% loss of such sum would only be

\$192.50. Therefore the award of the master on this basis is erroneous.

I (c) That the award of \$335.00 by the master is greatly in excess of any saving by defendants (appellants) due to the patented features of the towel rack used by them, for such towel rack represented in its greatest part merely the towel rack patented to said Guy Reid, above referred to, which is prior to the patent in suit, and in which appellee had no greater interest or right than these appellants, or the general public. "That though the claims of the complainant's patent are founded upon a combination that does not change the character of the invention, if in fact it is a mere improvement in some particular of the prior Reid towel rack. Nevertheless, the master refused to examine into the character of the complainant's patent, or to ascertain what portion of the towel rack used by this defendant said patent covered, and protected, and what portions it did not protect. (Master's report, pp. 63, 64) And further refused to segregate and apportion the alleged savings of defendants, due to the use of said towel rack relatively to the features of the latter, protected by said patent. All of which proceedings of the Master were contrary to law and equity."

I (d) The master's finding is further erroneous and inequitable because the complainant's patent apparently is itself dominated by another patent, as appellant sought to prove by proper and sufficient evidence, also their obligation thereunder; but appellee objected to such proof, and the master erroneously sustained such

objection. (Trans. of Test. before master, pp. 82-84) In consequence these appellants, contrary to the principles of equity, may be subjected to a double liability for the using of the same thing, instead of compensating each patentee only and portionately to his interest in such thing.

Appellants further excepted to the finding and award by the master of any other than nominal damages to the appellee, for the reason that the evidence does not show in what sum, if any, the appellee sustained any actual damages in the premises.

All these exceptions were overruled by the District Court (Trans. 91).

Thus arose *the two questions first above stated*, and here, for convenience, restated so as to bring out the contentions of the parties:

FIRST: The appellee affirms that the appellants' device, after its specified change, still infringed, because it embodied "*means which MIGHT be used to imitate the Brown patent, although it was conceded that it was NOT SO USED, nor so intended.*"

The appellants, on the negative, contend that they were not to be adjudged guilty merely because their device comes within the *letter* of the Brown patent.

SECOND: The appellee further affirms that Brown *though a mere improver of a pre-existing device*—the latter *capable of beneficial use* without his improvement, and in fact *the only use complained of was SUCH use*—by combining his new feature with the pre-

existing device *reinvented*, and may *reclaim*, the whole thing *in its ENTIRETY and may recover on the thing as a whole*; while appellants, on the negative, contend that Brown is restricted in recovery to the *specific features* of his invention; and such features are *to be segregated by him* as a basis for any recovery other than nominal.

On the above stated proceedings are based appellants'

ASSIGNMENTS OF ERROR

which for convenience will be divided into: Those relating to the interlocutory decree; Those relating to the subsequent accounting and final decree.

Those relating to the interlocutory decree specify as follows:

I.

In finding that the towel rack used by defendants from and after Dec. 1, 1914, to date of trial of this cause was not substantially different from the device claimed in the patent in suit, and that defendants' said device is an infringement of the device claimed in the patent in suit.

II.

In giving to the claims of the patent in suit a broader interpretation than warranted on the face thereof, or permitted by the prior state of the art.

III.

In finding that the device used by the defendants from December 1, 1914, is an infringement of the inven-

tion claimed in the patent in suit, because such finding is contrary to the principle and spirit of the patented invention in question, and also contrary to the law governing patents for combinations.

IV.

In finding that the device used by defendants from December 1, 1914, although merely an obvious modification of the patented invention of Reid, of record, which is prior to the patent in suit, nevertheless is an infringement of the patent in suit, for such finding disregards the rights vested in the general public prior to the issuance of the patent in suit.

V.

In finding that in order for the Court to hold that the device used by defendants from December 1, 1914, is not an infringement of the device claimed in the patent in suit, because substantially like the prior Reid patent of record, it must appear that the said defendants' device has added to it a new element or discovery, and without such defendants' device is merely colorable, and without such patentable variation as will avoid infringement.

VI.

In finding that there was substantial identity between the device claimed, and secured, by the patent in suit and the device used by defendants from Dec. 1, 1914, with respect: (first) to the result attained, (second) the means of attaining that result, and (third) the manner in which the different parts operate and cooper-

ate to produce that result; and in not finding that there was a substantial difference in said two devices in these respects.

VII.

In the entry of the interlocutory decree in this cause, because in prejudice of the substantial rights and equities of the defendants in the premises.

VIII.

In denying the petition of defendants for relief to file, under equity rule 34, a supplemental answer alleging material facts of which they were ignorant at the time of their original answer, to wit: setting forth patents of the United States granted for inventions prior to that of the patentee in suit, and bearing directly on the invention claimed in the latter patent with respect to the validity and scope thereof, and also bearing on the obligation of defendants under the patents of said prior inventors, which obligations defendants desired to be taken into account on their accounting herein.

Those relating to the subsequent accounting and final decree, specify errors as follows:

XI.

In overruling the defendants' exception I to the report of the Master on account.

XII.

In overruling the defendants' exception III to the report of the Master on accounting.

XIII.

In affirming the report of the Master, awarding the sum of \$335.00 against the defendants because such award is excessive, not supported by, and contrary to, the facts of the case.

XIV.

In awarding any other than a nominal sum against defendants, because the evidence does not show what, if any, actual damages the plaintiff sustained by any alleged infringement.

XV.

In the entry of the final decree in this cause because in prejudice of the substantial rights and equities of the defendants in the premises.

POINTS AND AUTHORITIES.

The questions will be discussed in the following order:

I. The questions arising on the interlocutory decree, finding infringement of appellants' device with respect to its arrangement, and conceded only use, after Dec. 1, 1914.

II. The questions arising on the accounting and the final decree.

I.

The interlocutory decree was wrong. It wrongfully punished appellants and deprived them of their substantial rights.

The Brown patent covers only a particular *functional* rearrangement of the prior Reid device. In each of the Brown claims this function is included and governs the particular co-operative arrangement of the towel-assembling post and the towel-stringing chain. This feature it was, Brown stated to the Examiner of the Patent Office, (see file wrapper, Trans. 109) “which in practice corrects the deficiencies of the subject matter of the several references”—among which the Reid patent was the most pertinent.

By this functional arrangement, Brown argued (Trans. 110) he obtained such distinctive advantages over the Reid device as to deserve a patent; and it was this feature alone which persuaded the Examiner to allow the Brown application for patent. Hence, *all claims of the latter were restricted to such particular feature, as above pointed out.*

Therefore under the law of patents, *THE FUNCTION of the elements, in the Brown patent claims, is the basis of their co-operative relationship.*

A patent is a contract between the public and the inventor (2 Rob. on Patents, 70, Sec. 481) and should be construed like any two-sided instrument, so as to get the intent of the grantor (the public) as well as of the grantee (the inventor). American Roll Gold Leaf Co. vs. Coe Mfg. Co., 212 Fed. 720, 724, CCA 1st Cir., citing *McClain v. Ortmyer*, 141 U. S. 419, 424.

On the law governing combination patents, it is said in 1 Rob. on Patents, 385:

“In determining the identity of the combination the investigator meets and is required to answer the four following questions: I, what are its constituent elements; II, what are the essential qualities of each; III, what is the nature of its co-operative law; IV, what are the new intrinsic attributes resulting from the combination of the old.”

At page 388, Sec. 282, it is stated: “The identity of the combination requires identity of elements, of co-operative law, and of essential attributes.” (Page 389) “When *all* the elements are the same, identity depends upon *identity of co-operative law*.” (Page 395) “That unless the co-operative law of two combinations are the same, the combinations are distinct, notwithstanding the identity of their elements.” Citing a list of earlier cases, among them *Pattee v. Moline Plow Co.*, 9 Fed. 821, 834, holding that the “defendant *had the right to combine the same parts as plaintiff had so long as he did not use the same combination*.”

In 3 Rob. on Patents, sec. 292, page 95, it is stated: “The infringement of a combination patent therefore consists in the use or sale of any combination in which precisely the same elements, or their equivalents, are united under the same co-operative law. To make or use or sell a combination in which the same elements are definitely combined * * * is not an infringement.”

In *Rich v. Baldwin*, 133 Fed. 920, 923, the court said: “In order to establish the infringement of a mere improvement of a machine, of former devices already in use for accomplishing the same result, the means must

be substantially the same, operate the same way, and accomplish the same result.”

In *Kenny Mfg. Co. v. J. L. Mott Iron Wks.*, 137 Fed. 431, 434, the court held that *Where it is shown that the field of invention was exceedingly narrow when the patentee entered it, his claim, in order to be upheld at all, must be limited to the feature shown and described.*

In *American Can Co. v. Hichmartt Asp. Canning Co.*, 137 Fed. 86, 90 (Cal. 1905), Judge Morrow remarked: “To sustain a claim of infringement of a patented machine, three things must be found, first identity of result, second, identity of means, and third, identity of operation.”

In *Lieberman's Exe'rs v. Rueell*, 165 Fed. 208, 210, the Court said: “Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device, and receives little aid from the doctrine of equivalents. If he depends upon a single limited feature (as in the case here) the doctrine will not ordinarily be applied so as to cover a device in which that feature does not appear.”

In *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed. 916, 923, CCA 8th Cir., the court says: “To sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained, (2) the means of attaining that result, and (3) the manner in which the different parts *operate and co-operate* to produce that result. If the devices are substantially

different in either of these respects a charge of infringement is not sustained.”

In *Kokoma Fence Mach. Co. v. Kinselmans*, 189 U. S. 8, 24, Chief Justice Fuller remarked: “We * * * agree with the (Circuit Ct.) in the conclusion that the machine lacks that identity of means and identity of operation which must be combined with the identity of result in constituting infringement.”

In the case at bar, the District Judge said, in his opinion, (Trans. 45) “*The claims of complainant’s patent, it must be conceded, are subject to narrow construction.*” “And during the trial, the court remarked (Trans. p. 25) “This is a very narrow issue, you (appellants) claim that you are using more nearly the Reid device than you are the Brown device.”

In combinations, the purpose thereof must be borne in mind, and “*even if the combination exists, yet, if it is not so arranged as to effect the (purpose) there is no infringement.*” That was the rule announced by Judge Blatchford in *Rennick v. Pond*, 20 Fed. cases, 537, 540.

In *Lovell v. Johnson*, 91 Fed. 160, the CCA, 1st cir., in construing the claim of a patent concerning an improvement of the breech loading gun, said: (162) “We think the claim valid when limited to the functions of the two slots.” And then distinguished a somewhat similar construction in defendants’ device by saying: (163) “The so-called slots on either side of the hammer in defendant’s breech piece is a mere passageway.” In other words, it *lacked the function* of similar slots of the patent.

In *Whitaker Cement Co. v. Huntington*, 95 Fed. 471 the C. C. A. 3rd Cir., in construing a patent having a claim which embodies the phrase "means for suspending said shafts from above so that said rollers may rotate against the die by centrifugal force," said. "The solution of this question depends upon the scope which should be accorded * * * with special reference to (said phrase)"; and, finding dissimilarity of functional purpose in the device held by the lower court to infringe, reversed the latter's decree and directed the bill to be dismissed.

In *Anthony Co. v. Gennert*, 108 Fed. 396, 398, the CCA, 3rd Cir., said, in construing a claim having a functional limitation: "*To ignore the express functional limitation of the claim * * * would be to create a new claim; not to interpret the one granted.*"

In *Masseth v. Larkin*, 111 Fed. 409, 411, Judge Buffington followed the latter rule with approval and applied it to a claim having the functional limitation: "arms adapted to engage with the sides of the hole."

In *Thompson Meter Co. v. National Meter Co.*, 106 Fed. 519, 530, the court, relying on the principal of the foregoing cases, which it cited, held it to be *a matter of law, well settled*, "*that a specific statement or function inserted into a claim cannot be disregarded,*" and only covers the use of such combination when it performs the function stated in the claim.

In *Gill v. Wells*, 89 U. S. 1, 14, the court said: "Valid letters patent may be granted for * * * a new combination of old ingredients, but the rule is equal-

ly well settled in such a case that the invention consists merely in the new combination of ingredients, and that a suit for *infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same ingredients.*"

In *Avery & Sons v. J. I. Case Plow Works*, 139 Fed. 878, 886, it was held, in construing a combination relating to a plow and embodying the phrase "brace rods rigidly attached to the mold board" that these terms "amount to a limitation which the (patentee) cannot escape for the purpose of making out infringement."

It may be said that the padlock of appellants' device introduced the bone of contention. It corresponds with *the letter* of the Brown patent claims, for it represents means usable for fastening the lower end of the towel-stringing chain to the bottom end of the towel-assembling post. But *the function* of the padlock in the Brown patent is one thing, and that in appellants' device another.

Appellants, after Dec. 1, 1914, when they changed their device, intended, and *exclusively used*, their padlock only for *securing the towel-assembling post* against unauthorized removal. Reid also used a lock for that purpose. Having used one kind of lock, can Reid not use another? There is nothing original in the use by Brown of a padlock for his purpose. He merely adopted it because readily had in the market, and cheap. He merely used it, as already stated, as a means for a *functional* purpose; and *only in that sense is it a legitimate*

element in the Brown claims. The function is indispensable, inseparable, without breaking the combination under the rules of law above referred to.

Appellants' device does not have, nor is it intended to have, *its chain arranged as in the Brown patent*. The functional element of the Brown claims is neither obtained nor desired in appellants' device, note *the only mode of use* of the latter as *conceded on the record* (Trans. 30, 82). Therefore, it is not an infringement. To hold otherwise is to disregard all fundamental patent law, and *to condemn on the letter*, in disregard of the spirit of the patent in suit. It would change the Brown patent from a certificate of reward for his invention to an instrument for embarrassing legitimate competitors, by wrongfully fining and restraining them in the same field of enterprise. Such is a perversion of the purposes of patents.

What MIGHT be done with appellants' towel rack is not the question.

Reid *might* have arranged his chain like that of Brown. Indeed, by merely moving the lower end of his towel-stringing chain close to the bottom of the shelf, and there fastening it on the wall, he obtained substantially the same result, with respect to convenient use of towels, as Brown does.

That which infringes if later, will anticipate if earlier. (Knapp v. Moss, 150 U. S. 221, 228; Miller v. Eagle, 151 U. S. 186, 203.)

That an invention which would not anticipate will not infringe, see Cook v. Sandusky Tool Co. (4 Sup.

Ct. Rep. 4; 28 L. Ed. 124; 26 O. G. 1114), where it is stated "If the hoe made * * * infringes the patent of the appellant, it was an anticipation of the invention. * * * If it is not an anticipation, it is not an infringement."

"That a device which, if existent before the making of patented invention, would not anticipate it, cannot, if made after the issue of the patent, be said to infringe it." See *Cleveland v. Chicago*, 135 Fed. 783.

Therefore, *only that which would anticipate, if earlier, will infringe if later.* In other words, *there is BUT ONE STANDARD to apply to the question as to the bearing of WHAT MIGHT BE DONE with one device as compared with another.*

The rule of law which governs this question has been frequently applied on alleged anticipations.

The U. S. Supreme Court decided, in *Topliff v. Topliff*, 145 U. S. 156, 161, "It is not sufficient to constitute an anticipation that the device relied upon *might*, by modification, be made to accomplish the same *function* performed by the patent in question, *if it were not designed* by the maker, nor adapted *nor actually used* for the performance of such function."

In *Dederick v. Cassell*, 9 Fed. 309, the court said: "It will not answer to say the combination required no invention, that any mechanic might have selected the parts and combined them. The same might be said with equal force in almost every instance in which a patent for combination is issued."

This is the rule also recognized by the Court of Appeals of this Circuit, in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, 284, the court said: "A device which does not operate on the same principle cannot be an anticipation." (page 285) "It is not sufficient to constitute anticipation that a device relied upon what might, by a process of modification, reorganization or combination with each other, be made to accomplish the function performed by the device of the patent sued on."

Since what MIGHT have been done would not bar the granting of a patent, neither will what might be done by the alleged infringer with his device, BUT WHICH HE DID NOT DO, constitute him an infringer.

Counsel for appellee, in the Patent Office, in order to obtain favorable action there asserted the rule (file wrapper, Trans. 115) "*It is scarcely necessary to argue that grounds of rejection of a claim and a defense against infringement are in all respects identical.*"

On a legal construction of a claim, founded on a function in the improved patent, any device which does not possess such function does not infringe, no matter to what extent, in other particulars, it may be similar. *Eppler v. Campbell*, 86 Fed. 141.

"*Though a device may be forced to operate like the plaintiffs, yet it is not an infringement if such use was not the object of its construction.*" *Buzzell v. Andrews*, 25 Fed. 822, cited with approval by Judge Hazel in *Winslow v. Bronson*, 106 Fed. 178, 183.

The attempt of appellee to make the defendants' device infringe—viewed in the face of the conceded only

use and arrangement of appellants' towel-rack, after its change Dec. 1, 1914, and to the end of the period accounted for, may be summed up by a remark often applied to contracts and their construction: "*It may be within the letter but not within the spirit of the contract.*"

Mr. Justice Brown, in *Westinghouse v. Boyden Powder Brake Co.*, 170 U. S. 537, 568, said: "The patentee may bring the defendant within the letter of his claims, but if the latter's device is not in fact identical with the principle of the invention claimed to have been infringed, he is as little subject to be adjudged an infringer as one who violates the letter of the statutes has to be convicted, where he has done nothing in conflict with the spirit or intent."

In *Standard Computing Scale Co. vs. Computing Scale Co.*, 126 Fed. 639, 649, the CCA, 6th Cir., applied the rule of the foregoing case, in reversing the lower court.

In *Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 773, the CCA, 2nd Cir., said: "Infringement should not be determined by a mere decision that the *terms* of a valid patent are applicable to the defendant's device. Two things are not precisely similar because the same words are applicable to each."

In *General Elec. Co. v. Allis Chalmers Co.*, 178 Fed. 273, 276, the CCA, 3rd Cir., said: "The mere fact that a device may be within the letter of the claim of a patent is not conclusive proof of infringement."

When a device, designed merely for an improvement of a well advanced art, is described as having particular features of construction, which are adapted to accomplish specific results or modes of operation, and the claim of the patent is for that device, the features so described are covered by the claim, and may not be rejected, or treated as of secondary importance, in order to extend the patent over other forms or features not described.

Temple Pump Co. vs. Goss Pump Co., 58 Fed. 196, 204, cited with approval in Standard Elev. Co. v. Crane Elev. Co., 76 Fed. 761, 767.

II.

The second question, as mentioned, arose on *the accounting before the Master*, and may be divided into three branches:

That is, the appellants contend:

(A) Under the evidence, the probable loss of towels, likely to result where not tied in place by a towel-rack, is to be estimated at 50% (Trans. 77). That \$385.00 represents the total value of the towels in use by appellants on the towel racks in question (Trans. 74). Assuming the latter to have saved the 50%, such would represent merely \$192.00. There was no evidence whatsoever furnishing a basis to the Master for awarding \$335.00.

(B) Whatever the saving against loss resulting from the use by appellants of the towel-racks in ques-

tion, such towel-racks represented in their major part merely the Reid invention, which Brown himself borrowed in his subsequent improvement; therefore, appellee was *not entitled to recover the whole* of said savings of appellants, but only such part, if any, as directly attributable to the Brown improvement. The burden of this was on the appellee. Failing to carry this burden he could only recover nominal damages.

(C) That appellants ought to be permitted to prove, by extraneous evidence, obligations due from them to other patents, if any, also embodied in the device in question, so that their obligations to other inventors may be taken into consideration on their accounting, and they be saved from paying twice for the same thing.

These questions will now be discussed in the order stated.

(A)

Assuming the infringement to be as found by the court what injury did the appellee sustain?

I.

Patent cases form no exception to the general rule that the patentee is to be compensated only for the property taken from him.

“The rule of damages is fixed and uniform as much so as in any ordinary action on the case * * * It establishes the same measure * * * as that which courts of law adopt * * * in all other torts.”

1 Robinson on Patents, Sec. 1051.

In order to determine the nature of the patentee's injury it is first to be ascertained what use he himself made of his device. For that determines whether any property right to which the patentee himself put his device, has been interfered with. Or whether complainant, in divulging the idea involved in the patentee's patent, performed a service to the general public, instructing them how to obtain a new benefit, for which service the user must compensate the patentee according to the reasonable value of such service.

In I Robinson on Patents, Sec. 1054, it is stated:

"The evil consequences resulting to the plaintiff from the violation of his patent depend upon the *method* in which he receives the benefit of his monopoly * * * the owner of a patent who neither derives nor purposes to derive any advantage from his rights under the patent cannot sustain injury from any appropriation of the invention on the part of others. * * *"

Section 1160, page 336:

"Direct evidence shows the extent to which the actual enjoyment of the invention by the plaintiff has been diminished by the wrongful acts of the defendant." (as found by the Master, there was no such evidence) "Indirect evidence discloses the benefits derived by the defendant from the infringement, and thence infers the extent of plaintiff's loss."

The latter evidence is the only kind offered in the case at bar.

The Master found: (Trans. 64) "*The particular towel rack covered and protected by the letters patent was not manufactured or sold by either complainant or defendant, and therefore there is no account of the profits made by defendant, or loss by complainant. Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license.*"

The finding of the Master disposes of the first phase of the question, and leaves only this phase: If the appellant laundry company has availed itself of the patentee's services without the latter's permission, what is the reasonable value of such service? The answer submitted by appellants to such question is: *The value of such service is the benefit derived therefrom; bearing in mind, however, the benefit must be derived from the services performed by the inventor, that is, the new idea transmitted, and the product of such service, as distinguished from the old device already in possession of the public.*

As already stated, the towel racks used by appellants from November 1, 1914, to December 1, 1914, are admitted to be like the Brown device; but those used from December 1, 1914, throughout the remainder of the period were, both in the arrangement and use of the towel-stringing chain, like the prior Reid device. See stipulation of parties, before Master, to that effect (Trans. 82).

The testimony before the Master showed that appellants, during the period accounted for, November

3, 1914, to February 28, 1916, laundered, 446,858 towels which they supplied to their customers on the towel-racks in question.

The total receipts of appellants from their said towel service were \$1340.50, which represented a gross profit of 25%, amounting to \$335.00, and *the Master awarded appellee the whole of such sum* (Master's report Trans. 66).

This award of the Master on accounting, it is submitted, was wrong, because not supported by the evidence; and the District Court erred in not sustaining appellants' exception thereto.

The appellee was entitled to recover only such profits of appellant laundry as were attributable to the use of the Brown improvement over the Reid device, if any, and these profits had to be established by the appellee.

There were no benefits attributable to the use of any towel-rack, except protection against loss of towels, by being carried away.

The proof as to the probable extent of such loss was very loose. Although there must have been some data based on experience, *the testimony offered* on this point by appellee *was a mere guess*. All the evidence offered was by Meyers, of appellee corporation, who testified (Trans. 77):

"We adopted a rack for holding the individual towels assembled instead of using loose individual towels, to keep them from being stolen. Without some means of securing them against theft *I think the public would*

have stolen fifty per cent. of them, or more. That would have been practically prohibitive of the business."

The question is, *during what period of time* would this loss have occurred? That was part of appellee's case. Assuming that the appellants would have lost one-half of their towels but for the use of a towel rack, the evidence shows (Trans. 74) that they used 7700 towels in their service of a total value of \$385.00; hence the loss of one-half of such sum would only be \$192.00; and that is all appellants saved, and all the appellee is entitled to recover.

The appellants excepted to said finding and report of the Master (see Exceptions I(a) (b) Trans. 86); and also assigned error to the District Court in overruling such exceptions.

But suppose it were assumed that the loss of appellants without said towel racks would have been so great that *all* their profits on towels would have been wiped out, *the protection from loss was not due to the functional re-arrangement of the prior Reid device by the Brown invention.*

In other words, Brown's improvement had for its purpose merely the rendering of the use of towels *more convenient. It did not add a particle to their security against theft. That idea Brown himself borrowed from Reid.* He so told the Patent Office (see Brown file wrapper, Trans. p. 109), where it is stated that *the Brown "application was drawn in view of the (Reid device)," the alleged deficiency of which Brown claimed to correct.*

Therefore, *it was incumbent on appellee to establish approximately the proportionate value of the Brown improvement over the Reid device; and he could recover such only.*

There was no apparent difficulty in making such segregation. The appellee simply refused to make such apportionment, and in this was sustained by the error of the Master. (Trans. 63.)

The error of the Master was clearly pointed out by the appellants to the District Court in their exceptions I (c) and III. Trans. 88 and 90.

(B)

The position taken by the appellee in the lower court, and adopted by the Master and the District Court, was that since the claims in the Brown patent state a combination apparently covering an entirety, therefore, the infringer of those claims must pay over all profits by a device covered by said claims.

The true rule is—appellants submit—that insofar as the savings from loss by the use of the towel-rack in question was attributable to the improvement of the Brown patent, they belong to the appellee, and insofar they were due to other parts or features of said towel-rack, they belong to the appellants.

This rule has long since been firmly established in the premises, as shown by the following line of authorities, culminating in our U. S. Supreme Court, by which the whole question is lucidly summed up in the case of Dowagiac Mfg. Co. vs. Minn. Moline Plow Co., 235 U. S. 641.

This case came up on certiorari from the C. C. A. 8th Cir. (183 Fed. 314). In order to bring out the points involved in this decision more clearly, appellants attach, as an appendix to this brief, a copy of the patent construed, viz.: The patent to W. F. Hoyt, on Grain Drill, granted February 10, 1891, No. 446,230.

The Court of Appeals, in deciding the controversy based on this patent, said: "While its claims call for all the elements of a then well known grain drill, namely, transporting wheels, frame, hopper, shoe, draft rods, clamping plates, etc., the spring metal pressure rod used in combination with those elements constitutes the invention. It rests in the improvement of a well known structure."

"Its character and scope have been thus briefly referred to, because they are important in determining the true measure of recovery for infringement. *The general rule in patent cases, like all others, is that a complainant is entitled to recover damages for the loss he has sustained by reason of the wrongful acts of the infringer, and the burden is on him to show how much it is.*" This was laid down by Mr. Justice Field * * * in *Garretson v. Clark*, 111 U. S. 120. He said:

"When a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particular his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefit from it may be distinctly seen and appreciated * * * *the patentee must in*

every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural or speculative. Complainant offered proof tending to show the profits made by the defendants in sales of the entire structure, without making any apportionment of them to the patented features, as distinguishing from the balance of the drill. It claimed the doctrine of apportionment to have no application, first, because, although the patent contained but one novel element, the combination of that element with the others constituted an appropriation of all of them in combination. In other words, the contention is that because the Hoyt patent is a combination patent, in which one novel feature is combined with several not novel, each and all of the elements associated in that combination are for the purpose of an accounting to be considered as appropriated by the patentee, and if there is an infringement of the novel feature all the profits made by the infringer upon the whole combined structure are recoverable, and that proof of those made by reason of the novel feature alone is unnecessary." The cases cited in support of such contention, the Court continued, "have recently been considered by us in an opinion written by Van Devanter, Circuit Judge in the case of *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, where a conclusion was reached adverse to the complainant's present contention. * * * We think that an apportionment of the profits between the patented and unpatented parts of the drill was indis-

pensably necessary. *The invention did not inhere in the entire machine as an entirety, but was only an improvement in a single element of an otherwise well known device.*"

It may be here remarked that this construction of our patent law is inevitable when the purpose of patents, as provided for in our Federal Constitution, is considered. Our constitution states that it is intended "to promote the progress of science and useful arts by securing, for limited times, to * * * inventors the exclusive rights to *their* respective * * * discoveries." Therefore, a patent is a reward for genius and industry, but *the reward given the inventor cannot be greater than the services rendered by him.*

When the Hoyt Drill case was reconsidered on certiorari by the Supreme Court, the same Judge who wrote the opinion in *Brown v. Lanyon Zinc Co.*, just referred to, having become a member of the Supreme bench, also wrote the opinion of the latter court. The Supreme Court, though it reversed the lower court because of there existing in the case "special reasons why a final disposition of the case should not be made on the present record," nevertheless affirmed the doctrine of the lower court, and but for such special reasons would have affirmed its decree (235 U. S. 641, 650).

The Supreme Court said: "Upon the evidence submitted, the masters reported that the recovery should be limited to nominal damages, which reports were confirmed by the Circuit Court. Its action was affirmed by the Circuit Court of Appeals." (183 Fed. 314.)

“The conclusion that the recovery should be thus restricted was rested upon these grounds: first, that the patent was not for a new and operative drill, but only for designated improvements in a type of drill then in use and well known; second, that the value of drills embodying this invention, as marketable machines, was not wholly attributable to the designated improvements, but was due in a material degree to other essential parts which were not patented; third, that the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence whereby the profits from the sale of the infringing drills could be apportioned between the patented improvements and the unpatented parts; and, fourth, that, although the number of sales made by the defendants was disclosed, the evidence did not present other data essential to an assessment of the damage sustained by the plaintiff by reason of the defendants’ infringement.

“It is quite plain, as we think, that the patent was not for a new and operative grain drill, but only for particular improvements in a type of grain drill then in use and well known. The invention was so described in the specification forming part of the patent. The inventor there said:

‘This invention relates to new and useful improvements in grain drills commonly known as “shoe drills;” and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

‘The object of the invention is to provide an independent spring-pressure for each of the shoes and covering wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another.’

“In keeping with this statement the claims in the patent were limited to a suitable construction and arrangement of spring-pressure rods in combination with certain correlated elements of the seeding part of a grain drill—the part which opens the furrows, guides the seed into them and then closes them. Of course, this was an important part; but it was only that; for other parts were required to complete the make and make it operative. Some of these were simple and easily supplied, such as the tongue and attachments to which the horses were hitched. Others were complex and required careful adjustment. This was especially true of the feeding mechanism whereby the grain was fed from the feed box or reservoir into the several hoppers in the continuous, uniform and precisely measured streams, so that it might be deposited in the furrows evenly and in suitable quantity. Only when all the parts were present and so adjusted as to perform their respective functions was the drill a practical and successful machine. In this respect no change resulted from the invention covered by the patent. It affected material improvements in one part, but did not obviate or diminish the necessity for the others.”

“We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The Masters and the courts below so found and we should hesitate to disturb their concurring conclusions upon this question of fact, even had the evidence been less clear than it was.”

“In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. It was essential, therefore, that they be separated or apportioned between what was covered by the patent and what was covered by it, for, as was said in Westinghouse Co. v. Wagner Co., 225 U. S. 604.

‘In such case, if plaintiff’s patent only created a part of the profits, he is only entitled to recover that part of the net gains.’

*“In the nature of things the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff and therefore it was required to take the initiative in presenting evidence looking to an apportionment. * * **

"The burden of apportionment was then logically with the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention."

"But the plaintiff did not conform to this rule. It neither submitted evidence calculated to effect an apportionment, nor attempted to show that one was impossible. * * * *It is inconsistent with the ordinary principles and practices of courts of chancery, either, on the one hand to permit the wrong-doer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to punish him by obliging him to pay more than a fair compensation to the person wronged.*"

In *Dun Mfg. Co. v. Standard Co.*, 204 Fed. 617, 618, 619, the C. C. A. 6th Cir., in reversing the lower court, said:

"In support of the master's report it is also urged upon us that the article, patented and completed and manufactured by defendant, was an entirety; that the five elements of the claims, recited as constituting a combination, make up the entire market value, and hence that *all* the profits on that structure flow from the infringement and that there is no occasion for any apportionment of profits by either party."

"This argument assumes that the rule of necessity for apportioning profits, and all the difficulties arising thereunder, pertain only to a case where a patented combination is a part of, or an attachment to, a more extensive structure, and, that, where the defendant's

sale is of a structure comprising only the combination of the patent, the defendant must, ipso facto, account for all the profits received on the sale. This view is plausible, as a matter of original reasoning, and finds support in statements made by several courts, and in some things said by this court; but we do not think it has ever been intended to establish this proposition as a general rule. (Authorities.)”

In *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 606, 607 (C. C. A. 6th Cir., 1914):

“The patent had reference to a device or structure for making blueprints by artificial light. It consisted of a glass cylinder around the outside of which were exposed the sensitive paper and the negative backed by an opaque curtain, facing inwardly, and on the inside of which an electric arc lamp was caused to be lighted for a suitable period. The cylinder was vertical and the electric light suspended from above, was passed slowly and steadily down through the axial line of the cylinder. Of course, a suitable supporting frame was necessary to keep the cylinder and light and their various appurtenances in proper mutual relation. It is apparent, from our previous opinion, that the invention as to which patentability and infringement were found had reference only to the means provided for causing and regulating the desired downward motion of the lamp. This is illustrated by Claim 12, which reads:

“12. In a printing apparatus the combination of a printing cylinder suitably mounted, an electric lamp,

electric connections with said lamp, a liquid cylinder, and hollow piston rod operating in said liquid cylinder and means whereby the hollow piston rod is automatically raised by the counterbalance weight of the lamp, substantially as described."

"(1) It is first said that the device in question is a *unitary* thing all parts of which are called for by the claim; that the claim is to a combination which is an entirety; and that the defendant's device was the same combination and the same entirety; and hence that all the profits flowed from the infringement all must be paid over. Leaving out of view for the moment the effect of the presence in the defendant's machine of the additions or improvements covered by the Wagenhorst patent, there is plausibility in this contention, and it finds apparent support in our decision in *Yesbera v. Hardesty*, 166 Fed. 120; but we do not construe that decision as intended to reach a case like the present. It is true that the patent there was for a combination, the elements of which, perhaps with one exception, were old; *but the essential point of that case is that the combination, as an entirety, was a new thing* and created a new demand *rather than being a mere improvement* on or addition to an old thing, making merely an increased or a different demand. The thing really invented was the complete folding seat, and it was rightly held that profits should be considered with reference to that new thing and not with reference to its old elements. *In the present case*, the terms of the claim furnish analogy to *Yesbera v. Hardesty*, but the similarity goes no farther. Generally, similar printing devices

were old. Nothing was new, except the means governing the descent of the lamp. Except for the artificial rule of the Patent Office which requires a claim to include a completely operative combination (and very likely, in spite of that rule), this invention could properly and accurately have been formulated and claimed as 'an improved lamp-controlling means for a printing apparatus, consisting of, etc.' *In determining the liability for profits, as well as in determining validity and scope, we must give due regard to the real invention—the real contribution or step in advance which the patentee has made—and the due effect of this consideration should not be obscured by the language in which the claim is clothed.* We pointed this out in *Dunn v. Standard*, 204 Fed. 617, 619; 123 C. C. A. 111, 113, saying:

“The question of profits can hardly depend on the largely fortuitous language of the claim in extending the combination, instead of on the actual advance in the art.”

“And it is made additionally clear by the discussion in *Seeger Co. v. American Co.* (D. C.) 212 Fed. 742, 748, 749. We, therefore, conclude that, for the purpose of awarding profits, defendant's structure is not to be treated as merely and only an embodiment of plaintiff's invention; *and it follows that an apportionment of the profits derived from the sale of that structure is prima facie necessary.*”

The principle has been acknowledged and restated by all the text writers.

In 3 Rob. on Patents, pp. 347, 348, in speaking of compensation to be allowed the infringer, says:

“It must also be confined to the benefits which flow from the use of plaintiff’s invention, as distinguished from every other instrument or operation which the defendant has employed in the manufacture of its products. Thus where the plaintiff’s invention is a mere improvement upon an existing process or machine, the advantage derived from the improvement must be separated from that accruing from the original, and only the value of the former advantage be considered.”

In Macomber’s Fixed Law of Patents, Sec. 298, p. 275, it is said:

“If the measure of damage be the same whether a patent be for an entire machine, or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a machine may recover the whole profits arising from the skill, labor or material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his profits to each of a dozen or more several inventors of some small improvement in the machine he has built.”

In *Elgin Wind Power & Pump Co. v. Nichols*, et al., 105 Fed. 780, 783 (C. C. A. 7th Cir.) it was held that:

“In a suit for infringement of a patent for an improvement only, in a windmill, it is error to assume that the entire profits from the sale of a windmill con-

taining the improvement are due to the presence of the improvement, and in order to recover any profits the burden is upon the complainant to prove what portion of the profits is due to the improvement."

In *Brickill v. Mayor of City of New York*, 112 Fed. 65, 71 (C. C. A. 2nd Cir.) it was held that:

"Where an apparatus for heating water in the boiler of a fire engine is patentable only because of the novelty of a tank and connections therewith to the heater forming a part of the combination or apparatus, the estimation of profits should be based on the relative expense or gain of using the patented apparatus and similar apparatus without the tank and tank connections."

In *Penfield et al. v. C. & A. Potts & Co.*, 126 Fed. 475, 485 (C. C. A. 6th Cir.), the court held that:

"The complainant must in every case give evidence tending to separate or apportion the defendant's profits and complainant's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible, not conjectural or speculative, or he must show by equally reliable or satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

In *Kansas City Hay Press Co. v. Devol et al.* 127 Fed. 363, 365, it was held that:

“Where defendants use complainant’s patented *improvement in connection with other parts of a machine which are free to all*, defendants are not liable for the *entire profits* derived from the use of such machines, because of their failure to keep separate the profits derived from the use of complainant’s improved device, and unless the complainant apportions his damages and the defendants’ profits between the patented and the unpatented features, or shows that the marketable value of the machine is due to the patented feature or shows an established license fee for the use of the patented feature, or establishes by satisfactory evidence the actual damage to his business by reason of the defendants’ competition, he can recover only nominal damages and profits.”

In *Baker v. Crane Co.*; *Crane Co. v. Baker*, 138 Fed. 60, 61 (C. C. A. 7th Cir.), it was held:

“On an accounting for profits and damages for infringement, where the device infringed is an improvement of an existing device, made and sold by defendant, it is necessary for complainant to show what proportion of the profit made on each infringing device sold was due to his improvement.”

It was held by the Circuit Court of Appeals in this Circuit in *Fullerton Walnut Growers’ Association v. Anderson-Barngrover Mfg. Co.*, 166 Fed. 443 that:

“The advantage which a defendant derived from using complainant’s patented invention over what he could derive from any other process or thing which was known prior to that invention constitutes the profits which the complainant is entitled to recover, where the

amount can be ascertained with a reasonable degree of certainty.”

In *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, 312 (C. C. A. 8th Cir.), it was stated by the court that:

“In an accounting for profits received by an infringer, where the infringement is not of an entire machine but only of an improved feature thereof, the recovery must be restricted to such portion of the profits derived from the entire machine as arose from the patented feature.”

In *American Street Flushing Mach. Co. v. St. Louis Street Flushing Mach. Co. et al.*, 192 Fed. 121, 122 (C. C. A. 8th Cir.), it was held:

“In an accounting for profits made by an infringer of a patented device, which as used constituted but a small part of a large completed structure, the complainant has the burden of proof to show the profits realized by defendant and ascribable to such particular device.”

In *Garretson v. Clark*, 111 U. S. 120, 121, the court said:

“Where a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particular he has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts so that the benefits derived from it may be distinctly seen and appreciated.”

But, the appellee argued in the Court below, if the rule laid down by the U. S. Supreme Court in the case

Dowagiac Mfg. Co. v. Minn. Moline Plow Co. (235 U. S. 64), is to be applied to the case at bar, then appellants must first show that they *had a right to use* that part of the device in question not covered by the Brown patent; in short, had the right to use *the Reid device*. The mere statement of this proposition seems to make it absurd. Why should Brown have a greater right in the Reid patented device than the general public has? The question, however, even lacks novelty, for it has been previously raised and decisively answered.

In the case of McCreary v. Penn. Canal Co., 141 U. S. 459, 465. Applying the rule there announced to the facts of the case at bar, the answer is:

“The question here is not whether the (appellant) had in fact the right to use this (prior Reid patented device), but whether so far as this particular case is concerned, it had not that right. *To hold that (appellant) had not, is to assume that (appellee) owned the earlier (Reid) patent, that it was valid, and that (appellants) had infringed it * * *. But these were issues which could only be determined upon a bill framed for that purpose, and could not be made the subject of contest in a collateral proceeding.*” That is, not in assessing damages arising on infringement.

It is also to be noted that the question as to what is open to the public as considered in the latter case involved further the decision as to what profits a mere improver of a pre-existing device is entitled to recover.

(c)
Another question raised on appellants' exception I (d) (Trans. 89) to the Master's report, was the re-

fusal of the Master to permit the appellants to show their apparent liability under a prior patent. See also proceedings set forth in the record (Trans. 51, 57) covered by petition of defendants for leave to file a supplemental answer, and the proposed supplemental answer.

This question may become important if this case should be sent back to the Master. By refusing to take into account appellants' apparent liability under another, prior patent, appellants *became exposed to a double liability* on the same device. *It wrongfully compelled appellant to pay under the Brown patent the tribute due to a prior patent*, if embodied in the same device for which appellants are to account.

"The liability of an infringer under another patent may be shown, and indeed must be shown if to be taken into account in determining such liability. *Elizabeth v. Paving Co.*, 97 U. S. 126, 141. *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 609.

In *Cann Bros. v. Mich. Iron Co.*, 152 Fed. 178, 182, the court said: Where the question arises whether the infringer is not also liable in connection with the device under another patent "in some other person, *the reasons for the rule requiring a distinguishing of profits becomes clearer because of the necessity of preventing a double liability on the part of defendant.*"

RESUME.

The prior Reid patent disclosed the towel-stringing chain, the basic idea of the device used by appellants, and which Brown himself copied. The Brown improve-

ment is a small advance, if any, in the art, and the claims require narrow construction. (Opinion of trial judge, Trans. 45.)

The customers did not demand any particular towel rack. They were interested only in clean towels. (Trans. 77, 78.)

Neither party made any charge to its customers for the towel rack. The savings from loss of appellants, due to using their towel rack, were due exclusively to the use of the primary Reid idea. The public did not demand a towel rack embodying the Brown improvement. (Trans. 77.) *There was complete absence of proof that the Brown improvement had any tangible value.*

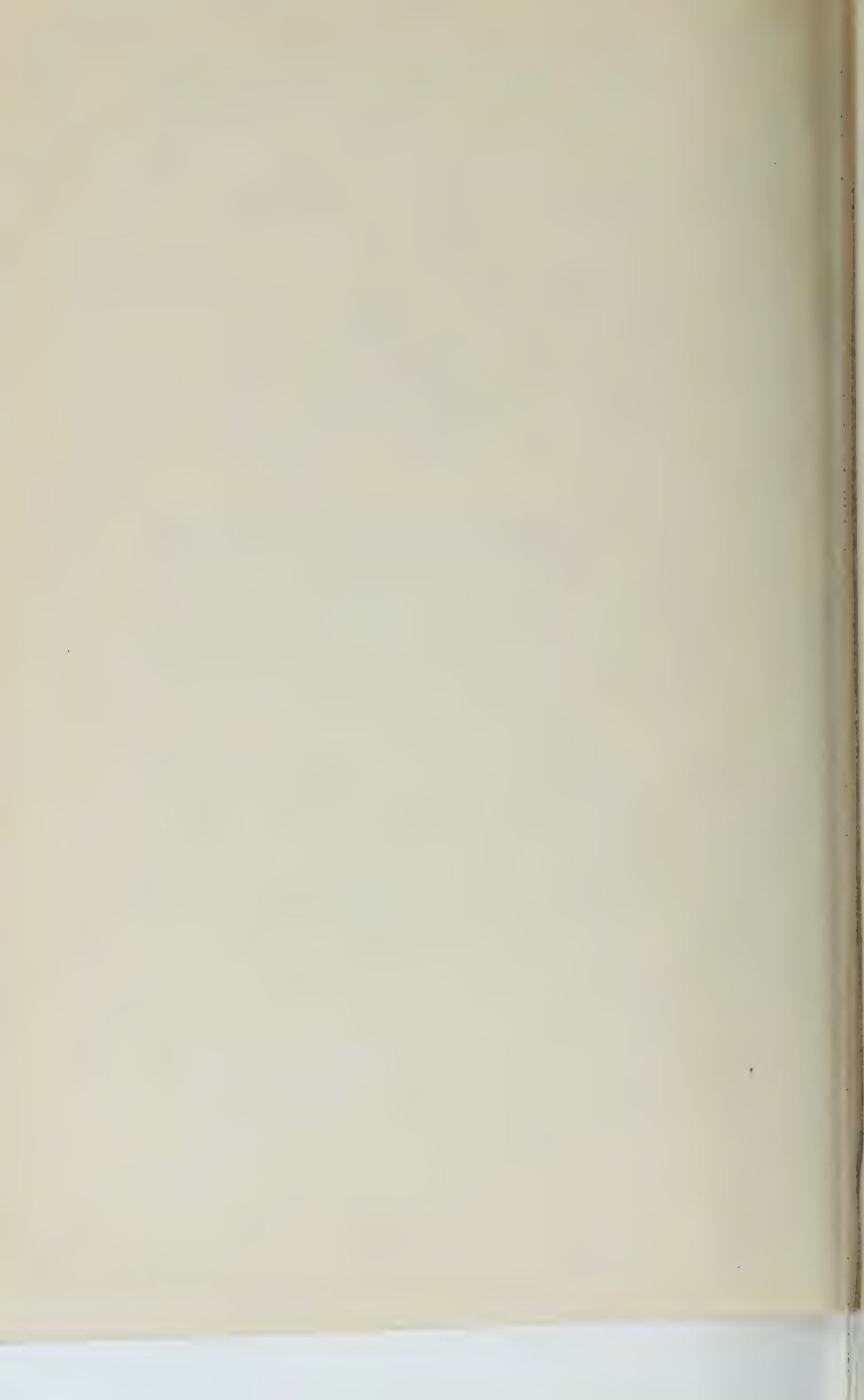
Therefore appellee should only have been awarded nominal damages, and then only for the brief period prior to December 1, 1914, when appellants purposely changed their device so as to in no way produce the function, and alleged new result, specified in the Brown patent.

Therefore, appellants submit that the proceedings of the court below were in error in all the matters specified, and were inequitable and unjust.

The decree should be reversed, with such instructions to the lower court as may be required to govern its further proceedings in this cause.

Respectfully submitted,

T. J. GEISLER,
Of Counsel for Appellants.



Patent

to

W. F. HOYT

Dated Feb. 10, 1891 No. 446,230

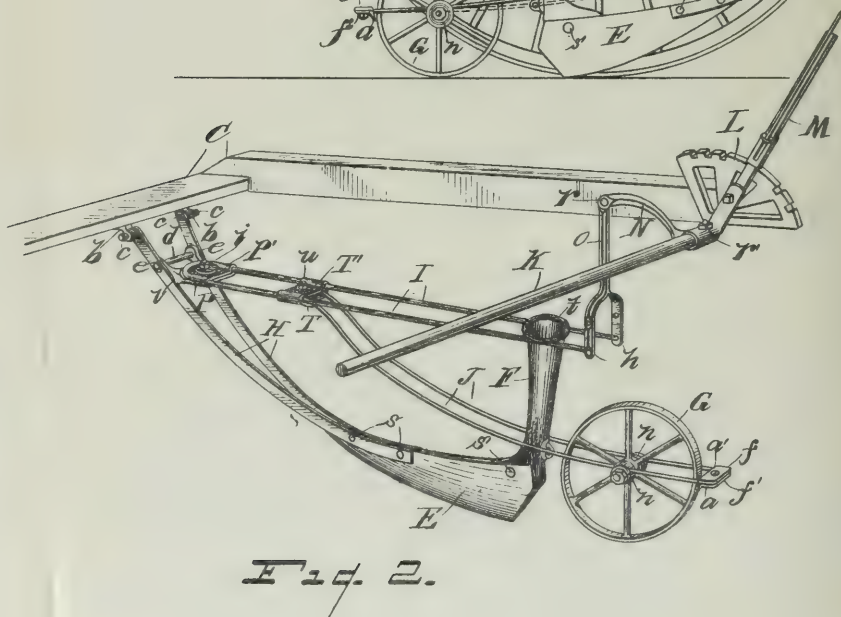
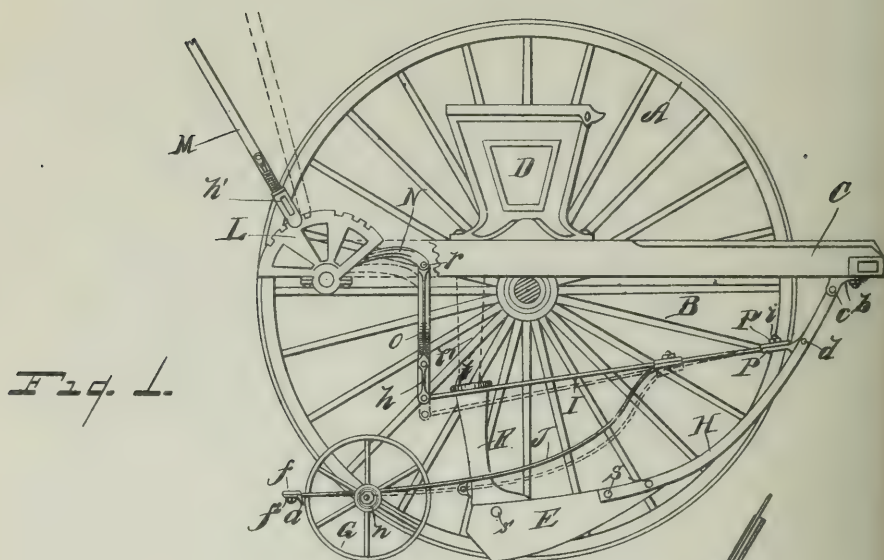
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2 Sheets—Sheet 1.

W. F. HOYT.
GRAIN DRILL.

No. 446,230.

Patented Feb. 10, 1891.



WITNESSES

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E. Wheeler

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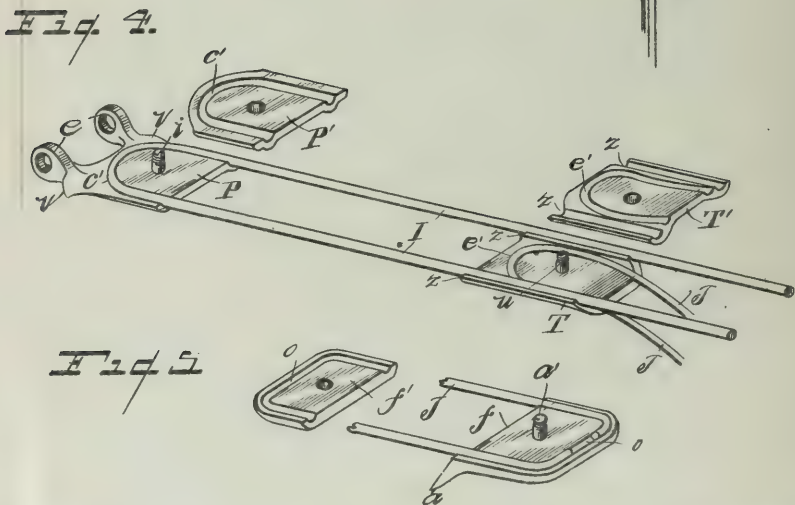
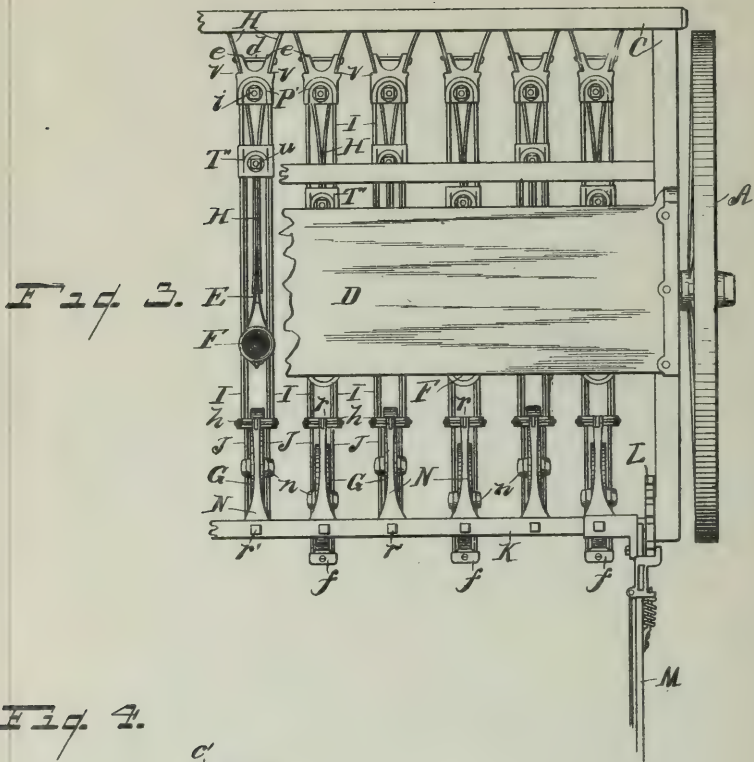
(No Model.)

2 Sheets—Sheet 2.

W. F. HOYT.
GRAIN DRILL.

No. 446,230.

Patented Feb. 10, 1891.



WITNESSES

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UNITED STATES PATENT OFFICE.

WILL F. HOYT, OF DOWAGIAC, MICHIGAN.

GRAIN-DRILL.

SPECIFICATION forming part of Letters Patent No. 448,230, dated February 10, 1891.

Application filed October 18, 1890. Serial No. 368,348. (No model.)

To all whom it may concern:

Be it known that I, WILL F. HOYT, a citizen of the United States, residing at Dowagiac, in the county of Cass and State of Michigan, have invented certain new and useful Improvements in Grain-Drills; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

This invention relates to new and useful improvements in grain-drills commonly known as "shoe-drills;" and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

The object of the invention is to provide an independent spring-pressure for each of the shoes and covering-wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering-wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another. This object is attained by the mechanism illustrated in the accompanying drawings, in which—

Figure 1 is an end elevation of my improved drill with one of the transporting-wheels removed, showing frame broken away. Fig. 2 is a perspective view of a portion of the drill embodying my improved features. Fig. 3 is a plan view of a portion of the machine. Fig. 4 is an enlarged perspective of the clamping-plates detached, between which the spring pressure-rods of the shoe and covering-wheel are adapted to be secured. Fig. 5 is a perspective view of the scraper plate and cap, adapted to be secured to the rear ends of the spring-pressure rods of the covering-wheels.

Referring to the letters of reference, A indicates the transporting-wheels of the drill; B, the axle connecting said wheels; C, the frame of the drill, and D the seed-box thereof, all of which parts are common.

E indicates the runners or shoes of the drill, to the forward end of which are riveted, as shown at *s* in Figs. 1 and 2, the curved draft-

rods H. Said rods curve upwardly and are slightly diverging, their upper ends being pivotally mounted on the trunnions *c* of the plates *b*, secured to the under face of the front edge of the frame C, as clearly shown in Figs. 1 and 2.

F indicates the feed tube or hopper, secured at its lower end to the heel of the shoe E, as shown at *s'*, and through which the grain is conveyed to the furrow in the ground formed by said shoe.

I indicates the spring pressure-rods of the shoe. Said rods are formed of one piece bent to a loop at their forward ends, as shown in Fig. 4, and extending rearwardly on each side of the hopper-F. The rear ends thereof are pivotally attached to the bifurcated end *h* of the arm O, as shown in Fig. 2, the upper end of said arm being pivoted at *r* to the free or outer end of the swinging arm N, the opposite end of the arm N being permanently secured at *r'* to the rock-shaft K, which extends along the rear edge of the machine-frame, and which is actuated by the lever M, attached thereto. The forward looped end of the rods I is secured between the clamping-plates P P', which are provided with the grooves *c'* (see Fig. 4) in their adjacent faces, that receive said rods, and in which they are firmly held by the bolt *i*, passing through said plates, which draws them tightly together upon said rods. The under plate P of said clamping-plates is provided with the lugs *e*, having eyes therein that are adapted to receive the bolt *d*, which passes loosely therethrough. The ends of said bolt pass through the adjacent faces of the draft-rods H, and are firmly secured therein, as shown in Figs. 2 and 3, by which means the forward ends of the pressure-rods I are pivotally coupled to the draft-rods. The lugs *e* of the plate P, extending between the draft-rods H, keep the upper ends of said rods spread and in contact with the trunnions *c* of the supporting-plates *b*. The plate P is also provided with the horizontal shoulders *v* on each side thereof, that are adapted to engage the upper edge of the rods H, for purposes hereinafter described.

J indicates the draft and spring pressure-rods of the covering-wheels G, which curve upwardly at their forward ends and are secured between the plates T T', mounted on

the rods II, as shown in Fig. 2. The adjacent faces of the plates T T' are provided with the grooves e' and z . (See Fig. 4.) The grooves e' receive the looped end of the rods J and the grooves z receive the parallel rods I. Said plates are provided with the bolt u , passing therethrough, by means of which they may be securely clamped upon said rods, as shown in Fig. 2, thus firmly securing the plates T T' to the rods I, and the looped end of the rods J between said plates. The rods J extend rearwardly on each side of the hopper F, and pass through and are secured in the hub n of the covering-wheel G. By this means said wheel is guided so as to travel directly in the furrow made by the shoe E in which the seed is deposited. The rods J extend slightly rearward of the wheel G, and are secured between the plates $f f'$, that are provided with the grooves o in their adjacent faces, that receive the bent ends of said rods, as clearly shown in Fig. 5, said plates being clamped upon said rods by means of the bolt a' passing therethrough.

The under plate f is provided with a depending lip a , and the parts are so arranged that said lip acts as a scraper to free the periphery of the wheel G from dirt during the operation of the machine, as shown in Figs. 1 and 2.

The shoes and hoppers, with their draft-rods and covering-wheels, and the spring pressure-rods and their actuating-arm O and swinging arm N, attached to the rock-shaft K, are arranged consecutively throughout the machine, as shown in Fig. 3, and are adapted to be operated simultaneously by means of the lever M, attached to the shaft K, the grain being conveyed to the hopper F of the shoe from the seed-box D by means of a flexible hose l' . (Shown by dotted lines in Fig. 1.) It will now be apparent that by throwing the lever M forward the shaft K is rotated, carrying the outer end of the swinging arm N downward, which, being coupled to the arm O, forces said arm down and depresses the rear ends of the spring-rods I, coupled to the bifurcated end h thereof, the shoulders v of the plate P, to which the forward ends of the rods I are attached, bearing upon the edge of the rods II. As the rear ends of the rods I are depressed the pressure thereon is conveyed through the rods I to the shoe E. At the same time the rods I are depressed by the action above described, the forward ends of the rods J are carried down, throwing an increased pressure on the wheel G, which position of the pressure-rods, lever M, and arm N, is clearly shown by dotted lines in Fig. 1. By this arrangement it is evident that the pressure on the shoe and covering-wheel is a spring-pressure, and may be regulated as desired, enabling a heavy pressure to be applied when the ground is hard or a light pressure when it is soft and yielding.

The arrangement of transmitting the pressure applied to the rods I to the shoe E through

the medium of the shoulders v of the plate P, bearing upon the draft-rods II of said shoe, enables the shoe to drop into a depression in the surface in advance of the covering wheel G, and prevents said wheel from raising the shoe from the ground when riding over an obstruction, thereby insuring a continuous furrow, which would not be the case were the connection rigid between the rods I and II.

When it is desired to raise the shoes and covering-wheels in transporting the machine from one field to another, the lever M is thrown to the rear, rotating the shaft K and raising the swinging arm N, thereby drawing upward on the arm O and raising the rods I, which engage with the annular flange t at the upper end of the hopper F, raising said hopper and shoe, as shown in Fig. 2. The rods J of the covering-wheel G being secured to the rods I, said wheel is also raised by the same operation. Thus it will be seen that by throwing the lever M to the rear the shoes and covering-wheels are simultaneously raised from the ground, and by means of the segment-rack l , that receives the locking-bolt h' of the lever M, said lever may be secured in any desired position. It will also be seen that the manner of mounting the plates T T' upon the rods I permits of their longitudinal adjustment thereon, and the forward ends of the rods J of the covering-wheel G being secured between said plates, the distance between said wheel and the heel of the shoe may be increased or decreased by said adjustment, and that by sliding said plates rearwardly upon the rods I the forward movement of the lever M will throw a still greater pressure upon the wheel G.

Having thus fully set forth my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In combination with the transporting-wheels and frame, the hopper, shoe, and draft-rods, the latter having a pivotal connection with the frame, the clamping-plates having a pivotal connection with the draft-rods, the spring-metal pressure-rods attached to said plates, said rods extending rearwardly of the hopper, the forked arm coupled to said rods, and means for raising and lowering said arm, substantially as specified.

2. In combination with a frame of a grain-drill, the hopper having a flange at the upper end, the shoe attached to the hopper, the curved draft-rods leading from the shoe and having a pivotal connection with the frame of the machine, a swinging head located between the upper ends of the draft-rods, spring-metal rods attached to the swinging head, said rods extending back of the hopper and below the flange thereof, said spring-metal rods being coupled to an arm, said arm having means for raising and lowering it, and means for locking the parts, for the purposes set forth.

3. In combination with the frame, hopper, shoe, and draft-rods, the plates pivotally at-

attached between the upper portions of said draft-rods, said plates having the horizontal shoulders, said shoulders bearing upon the draft-rods, the spring-metal rods attached to
 5 said plates and passing rearward of and on opposite faces of the hopper, and means for applying pressure to the rear ends of said spring-metal rods, for the purpose specified.

4. In a grain-drill, the combination of the
 10 wheels and main frame, of a hopper, shoe, and draft-rods having a pivotal connection with the frame, means for applying spring-pressure to the shoe, comprising the pressure-rods having their forward ends coupled to
 15 the draft-rods and a lever at the rear ends, a wheel traveling in the path of the shoe, and spring-metal rods coupling said wheel and its journal-bearing with the spring-pressure rods, substantially as indicated.

20 5. In a seed-drill having a hopper, shoe, and draft-rods, the hopper having a projection on its periphery at the top, plates pivoted between the upper end portions of the

draft-rods, spring-metal rods clamped between said plates, means for raising and lowering the rear ends of said rods, and a wheel
 25 traveling in the rear of the shoe, said wheel having a spring-pressure connection with the spring-metal rods leading from the draft-rods.

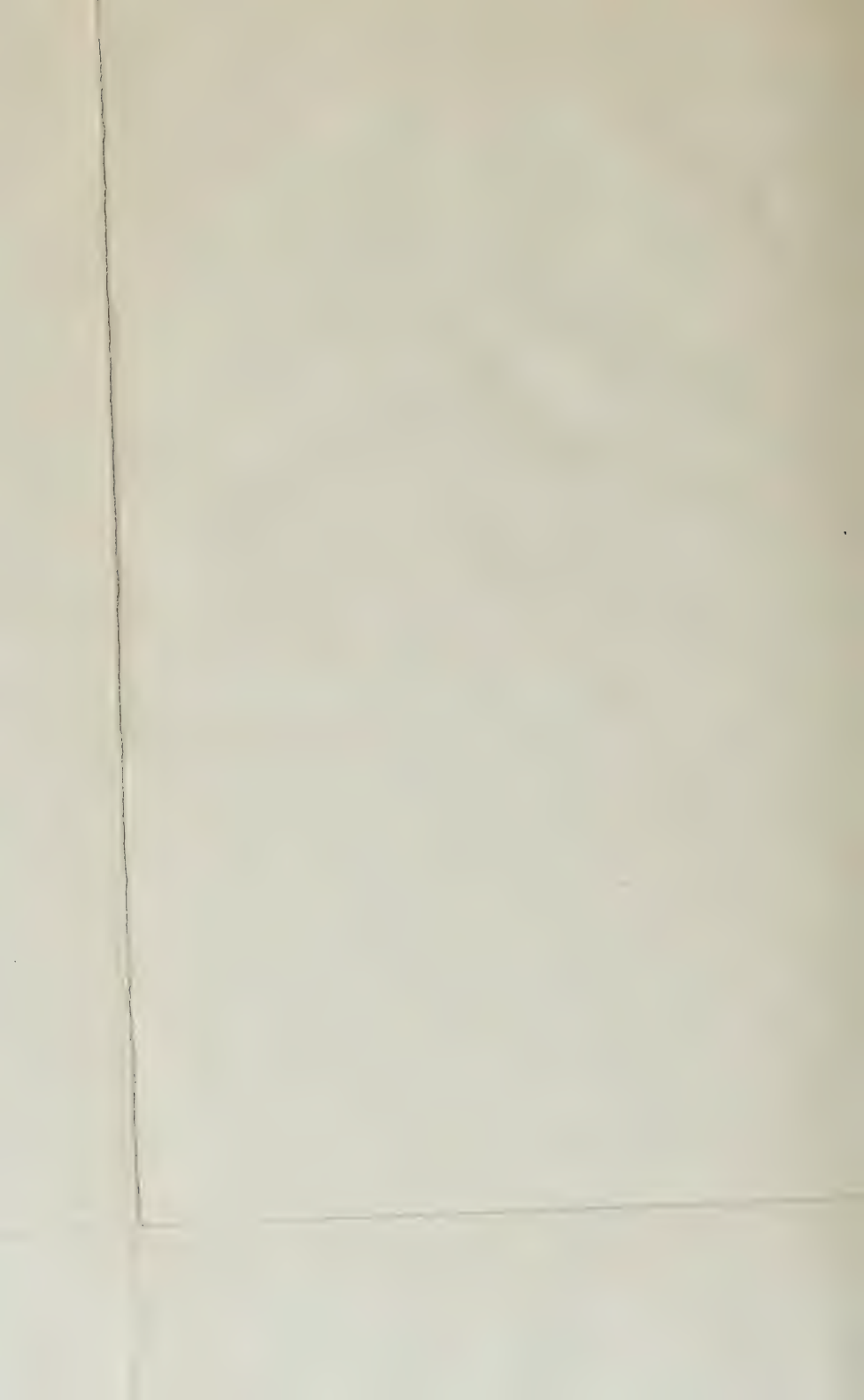
6. In combination with the hopper, shoe, 30 and draft-rods, the plates pivoted between the draft-rods, the spring I, clamped between said plates and extending rearward of the hopper, means for raising and lowering the rear ends of said spring, the wheel in the rear
 35 of the shoe, the plates T T', mounted on the spring I, and the doubled spring-metal rod J having one end clamped between the plates T T' and having on the opposite ends the scraper-plates f f', for the purposes specified 40

In testimony whereof I affix my signature in presence of two witnesses.

WILL F. HOYT.

Witnesses:

C. A. PATTISON;
 A. VANUXEM.



IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

**BROADWAY TOWEL SUPPLY
COMPANY, a corporation, and
AMOS BURG,**

Appellants,

vs.

**BROWN-MEYER COMPANY, a
corporation,**

Appellee.

Appeal from the District Court of the United States.
for the District of Oregon.

APPELLEE'S BRIEF.

Filed

MAY 1 1911

F. D. Monckton,
Clerk.

JOSEPH L. ATKINS,
of Counsel for Appellee.

T. J. GEISLER,
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Appellee.

No. 2971.

Appeal from the District Court of the United States.
for the District of Oregon.

APPELLEE'S BRIEF.

INFORMALITY OF APPELLANTS' BRIEF.

In this case it appears that the Assignment of Errors on behalf of the appellants fails to comply with the requirements of Rule 11 of this Court, and motion to dismiss upon that ground will be presented under provisions of Rule 21.

It also appears that no Brief, conformable to the requirements of **Rule 24** of this Court, has been filed, and motion to dismiss upon that ground will also be presented.

It further appearing that certain matters not in evidence here have been included in the Transcript, and also that certain copies of patents not embraced within the certified Transcript, have been served upon counsel for Appellee, presumably with the purpose of attempting to present them before this Court in argument in this appeal, motion will be presented to strike from the record, and to disregard such matters, or so many of them as this Honorable Court may deem proper to exclude.

In view of the failure of the Appellants to present in their Brief (a) a concise abstract or statement of the case, or (b) a specification of the errors relied upon, or (c) a Brief of the argument in proper form, all as prescribed by **Rule 24** aforesaid, it appears that Appellee's Brief should, in accordance with **Sec. 3** of the Rule, present, at the outset, a statement of the case, in which view the following is submitted:

STATEMENT OF THE CASE.

This is an appeal from decision and decree in favor of Plaintiff in a suit brought in the United States District Court, for the District of Oregon, by **Brown-Meyer Company**, hereinafter, in respect to its relationship fixed in the Trial Court, designated Plaintiff, against **Broadway Towel Supply Company**, a corporation, and **Amos Burg**, in like manner designated Defendants, for the

infringement of U. S. Letters Patent No. 1,115,895, granted to Brown-Meyer Company, as assignee of Charles F. Brown, under date of November 3, 1914, upon application filed by said Brown, on August 13, 1913, for Improvements in Towel Holders. The device in suit, as indicated in the patent, is "one for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry, until such time as they are required, one by one, for use." Provision is also made for conveniently withdrawing the towels, one by one from the pile, for facilitating the manipulation of each while in use, and for securing them against accidental misplacement or intentional and unauthorized removal after use.

ANSWER ADMITS VALIDITY OF THE PATENT.

To the Bill of Complaint, Defendants made Answer in usual form, admitting the validity of the patent. ,

PRIOR STATE OF THE ART.

Answer sets up the prior state of the art to be that shown in Letters Patent of the United States as follows:

N. S. Baldwin and E. S. Goodwin, Number 557,754, date Apr. 7, 1896.

J. G. Cooner, Number 908,076, date Dec. 29, 1908.
J. Rouso, Number 42,398, Des., date Apr. 9, 1912.
L. Straub, Number 1,038,984, date Sept. 17, 1912.
T. K. Taylor, Number 1,052,292, date Feb. 4, 1913.
G. Reid, Number 1,067,622, date July 15, 1913.

T. Heins and E. R. Galland, Number 1,078,501,
date Nov. 11, 1913.

At the trial Defendants introduced in evidence copy of the File Wrapper and Contents of the patent in suit (Transcript, pp. 105-121), and copies (not placed in printed Transcript, see Transcript, p. 102) of the patents set up in the answer, all of which were considered by the Patent Office in the examination of the application.

At the trial, also, particular stress was laid on the Reil patent, No. 1,067,622, Defendants' Exhibit 7 (not paged in Transcript). The differences between the Reid device and that in suit are radical and obvious to one skilled in the art and acquainted with both. The Patent Office considered, along with others set up in the answer, this patent in particular, and decided that the Reid patent, as well as the others, was not an anticipation of the patent in suit. To the allowance of the patent in suit over the Reid patent, attention of counsel for Defendants was pointedly directed by the Court at the trial, and in response to the Court's reference thereto, Defendants' counsel says, "and in that (action) the Patent Office, we will say, was correct" (see Transcript, pp. 22-23).

INFRINGEMENT ADMITTED.

Said Answer furthermore admits (Transcript, p.

11) Defendants' infringement of said patent from the date thereof to about November 30, 1914.

The fact of such infringement is also expressly admitted by counsel for Defendants in answer to question put by the Court (Transcript, p. 15).

CHANGE ALLEGED TO AVOID INFRINGEMENT.

At the time last named, counsel alleged on behalf of Defendants, that they made a change in their device by which he claims they avoided infringement. The language employed by Defendants' counsel in referring to the alleged change is significant in that it admits continued use of the same device. In reply to the question put by the Court, "You are not using it, or have you changed it?" Defendants' counsel replies, "We have changed it, your Honor." (Transcript, p. 15.)

In respect to the alleged change aforesaid, in Defendants' device, admitted before such alleged change to have been an infringement of the patent in suit (Transcript, p. 15), and to have been made about Dec. 1, 1914, W. C. H. Smith, Defendants' witness, who says (Transcript, p. 28) he is one of the "partners" of the Broadway Towel Supply Company as he was in July, 1914, testifies, that when Defendants were required, by ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29270 (set forth in Transcript, p. 33) to use a sanitary device, "The one I installed was the one they (Plaintiff had been using before I put ours in" (Transcript, p. 32).

CHANGE ALLEGED IS MERE CHANGE OF USE. INFRINGING DEVICE UNCHANGED.

The change referred to, made about Dec. 1, 1914 (Transcript, p. 31), was no change in the device at all. It consisted, according to Defendants' witness, merely in temporarily disengaging the end of the chain from the lock and putting that to the end of the basket. (See next to last paragraph, p. 31, Transcript.) The structure continued to be identical with that admitted in the Answer to be an infringement. Defendants persisted in using the same device until restrained by injunction.

COURT HOLDS INFRINGING DEVICE UNCHANGED.

His Honor, Judge Wolverton, decides (Transcript, p. 45): "The defendants are using a device in practically all respects, as to construction and operation, the same as Plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling members, as does the Plaintiff's contrivance," and that "Defendants are infringing." In reference to alleged change in Defendants' device (Transcript, p. 47) the Court says: "I am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement."

INTERLOCUTORY DECREE.

Upon the decision aforesaid "Interlocutory Decree

for injunction and accounting" (Transcript, pp. 47-50) was entered.

MOTION FOR NEW TRIAL.

Thereupon Defendants presented "Petition for leave to file supplemental answer and take proofs thereon" (Transcript, pp. 51-56), accompanied by "Proposed Supplemental Answer" (Transcript, pp. 57-60).

In the said petition (Transcript, pp. 52-53) and in the Proposed Supplemental Answer (Transcript, p. 58), reference was made by way of proposed defense to an alleged patent to one Jacques Rouso, which was alleged to have issued October 19, 1915, *a date subsequent to that of the patent in suit and antecedent to the date of trial* by several weeks.

Reference was therein also made to an alleged application by one Henry A. Ammann, not even alleged then to have gone to patent, and which for that reason, if for no other, would be wholly immaterial.

PETITION DENIED.

The said petition was, on April 17, 1916, by Judge Wolverton "in all respects overruled and denied" (Transcript, p. 61).

PROCEEDINGS BEFORE MASTER.

Thereupon, an accounting before a Special Master,

John B. Cleland, Esq., was had, and award made by him of \$335.00 with costs and disbursements, and a recommendation to the Court to award triple damages (Transcript, p. 67).

A stipulated condensed statement of part of the testimony taken before the Master appears in the Transcript, pp. 68-85, inclusive.

It shows that Defendants ceased not even before the Master in their efforts to secure consideration of the alleged Rousso patent, which had been previously denied consideration by the Court, pressing them even to the extent of demanding that the Master review the decision of the District Court (Transcript, p. 63). Counsel for Plaintiff objected to the introduction of the alleged patent, and the objection was sustained by the Master (Transcript, p. 84).

EXCEPTIONS TO MASTER'S REPORT.

Exceptions to "Master's Report" (Transcript, pp. 86-91) were filed on behalf of Defendants, in effect as follows:

I.

(a) To the amount of the award made by the Master (Transcript, p. 86).

(b) To the award as being unsupported by the evidence (Transcript, pp. 86-87).

(c) To the award as being excessive (Transcript, pp. 88-89).

(d) To the award on the ground that the Master should have taken into account the alleged Rousso patent (Transcript, p. 89).

II.

To the recommendation of the Master to the Court to award triple damages (Transcript, pp. 89-90).

III.

To any award by the Master of other than nominal damages (Transcript, p. 90).

EXCEPTIONS I AND III OVERRULED.

EXCEPTION II SUSTAINED.

The Court overruled Exceptions I and III and sustained Exception II, thereby denying triple damages (Transcript, p. 91).

FINAL DECREE.

Final Decree was entered Jan. 22, 1917 (Transcript, p. 92), and thereupon this appeal was taken (Transcript, pp. 92-93).

ASSIGNMENTS OF ERROR, ARGUMENT.

In anticipation of the possibility that this Honorable Court may determine, upon hearing of motion, that Appellants are entitled to be heard upon some one or more of their Assignments of Error presented, attempt is hereinafter made to arrive at an understanding of their apparent or possible meaning and to make herein reply thereto.

Proceeding accordingly, the several Assignments will be set down, *seriatim*, each under its respective numeral, with argument following.

I.

“In finding that the towel rack used by defendants from and after December 1, 1914, to date of trial of this cause was not substantially different from the device claimed in the patent in suit, and that defendants’ said device is an infringement of the device claimed in the patent in suit.” (Transcript, p. 96.)

This appears to assign as error, first, the finding of the District Court that Appellants’ device used after Dec. 1, 1914, was not substantially different from that defined in the claims of the patent in suit.

Second: That their said device infringes.

Identity of Appellants’ device prior to Dec. 1, 1914, is admitted in the Answer (Transcript, p. 11), as well as in response to inquiry made by His Honor, Judge Wolverton (Transcript, p. 15). Furthermore, identity is, in effect, admitted after Dec. 1, 1914 (Transcript, p. 29, next to last paragraph).

It is the finding of fact by the Court that there was no material change made in said device (Transcript, pp. 45-47), to which Assignment of Error is, it is assumed, directed.

Findings of Trial Court presumptively correct, and will not be reversed if not unreasonable in themselves or not clearly

in conflict with the preponderance of evidence.

See *Warren vs. Burt*, 58 Fed. 101 (C. C. A.) and authorities noted thereunder.

Latta vs. Granger, 68 Fed. 69 (C. C. A.).

II.

“In giving to the claims of the patent in suit a broader interpretation than warranted on the face thereof, or permitted by the prior state of the art.” (Transcript, p. 96.)

No reference is made to Transcript. Appellee denies that the District Court gave any interpretation to the claims of the patent, other than that allowed to them by the admission of infringement by Defendants below (Transcript, p. 11).

The Court simply held (Transcript, p. 29) that there was no change made by Defendants in the device which they admitted to be an infringement. Therefore interpretation of the claims was unnecessary.

III.

“In finding that the device used by the defendants from December 1, 1914, is an infringement of the invention claimed in the patent in suit, because such finding is contrary to the principle and spirit of the patented invention in question, and also contrary to the law governing patents for combinations.” (Transcript, p. 96.)

No error assigned. Court below simply holds that an admitted infringement was continued.

IV.

“In finding that the device used by defendants from December 1, 1914, although merely an obvious modification of the patented invention of Reid, of record, which is prior to the patent in suit, nevertheless is an infringement of the patent in suit, for such finding disregards the rights vested in the general public prior to the issuance of the patent in suit.” (Transcript, p. 97.)

Finding of Court respecting Reid patent sustains decision of the patent office and view of Appellants’ counsel (Transcript, p. 23), and accords with admission in the Answer of validity of patent in suit.

Finding of Court not ordinarily disturbed on appeal.

Vide supra, citations under Assignment I.

V.

“In finding that in order for the Court to hold that the device used by defendants from December 1, 1914, is not an infringement of the device claimed in the patent in suit, because substantially like the prior Reid patent of record, it must appear that the said defendants’ device had added to it a new element or discovery, and without such defendants’ device is merely colorable, and without such patentable variation as will avoid infringement.” (Transcript, p. 97.)

Same objection as to Assignment IV.

Also assignment predicated on reasons given by Court for decision improper and unavailing.

Clark vs. Deere and Mansur Co., 80 Fed.
534 (C. C. A.).

VI.

“In finding that there was substantial identity between the device claimed, and secured, by the patent in suit and the device used by defendants from December 1, 1914, with respect (first) to the result attained, (second) the means of attaining that result, and (third) the manner in which the different parts operate and co-operate to produce that result; and in not finding that there was a substantial difference in said two devices in these respects.” (Transcript, p. 97.)

A repetition of Assignments V and VI under different form. Same objections.

VII.

“In the entry of the interlocutory decree in this cause, because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 98.)

Injunction not reviewed unless abuse manifest.

Workingmen's Amalgamated Council vs.
United States, 57 Fed. 85 (C. C. A.).
Thompson vs. Nelson, 71 Fed. 339.

VIII.

"In denying the petition of defendants for relief to file, under equity rule 34, a supplemental answer alleging material facts of which they were ignorant at the time of their original answer, to-wit: Setting forth patents of the United States *granted for inventions prior to that of the patentee in suit*, and bearing directly on the invention claimed in the latter patent with respect to the validity and scope thereof, and also bearing on the obligation of defendants under the patents of said prior inventors, which obligations defendants desired to be taken into account on their accounting herein." (Transcript, p. 98.)

Statement in italics is false.

Denial of new trial will not be reviewed.

Henderson vs. Moore, 9 U. S. (5 Cranch)
11.

"This Court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error."

The Marine Ins. Co. vs. Hodgson, 10
U. S. (6 Cranch) 206.

IX.

“In the entry of the supplemental interlocutory decree because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 98.)

Evidently a mistake. Omitted from brief. (Appellants' Brief, p. 24.)

X.

“In the refusal to vacate said supplemental decree.” (Transcript, p. 98.)

Evidently a mistake. Omitted from brief. (Appellants' Brief, p. 24.)

XI.

“In overruling the defendants' exception I to the report of the Master on accounting.” (Transcript, p. 98.)

XII.

“In overruling the defendants' exception III to the report of the Master on accounting.” (Transcript, p. 98.)

XIII.

“In affirming the report of the Master, awarding the sum of \$335 against the defendants because such award is excessive, not supported by, and contrary to the facts of the case.” (Transcript, p. 99.)

XIV.

“In awarding any other than a nominal sum against defendants, because the evidence does not show what, if any, actual damages the plaintiff sustained by any alleged infringement.” (Transcript, p. 99.)

XV.

“In the entry of the final decree in this cause because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 99.)

Assignments of Error XI, XII, XIII, XIV and XV if, upon determination of motion to dismiss, they be held to be good in form, appear to be to the findings of the Court and to the Master's findings.

It is well established that such findings when adopted by the Court are *prima facie* correct. Burden is on objecting party.

Metsker vs. Bonebrake, 10 U. S. 66.

Tighlman vs. Proctor, 125 U. S. 136.

Crawford vs. Neal, 1444 U. S. 585.

Furrer vs. Ferris, 145 U. S. 132.

Note particularly Warren vs. Keep, 155 U. S. 265, touching finding of damages in patent cause.

Brown Bag Filling Mach. Co. vs. Drohen, 175 Fed. 576 (C. C. A.).

Brown vs. Lanyon Zinc Co., 179 Fed. 309
(C. C. A.).

Luten vs. Sharp *et al*, 234 Fed. 880.

In submitting the foregoing, counsel for Appellee asks leave of the Court to file a supplemental brief, if, hearing being allowed by the Court, he should deem it advisable so to do.

Respectfully submitted,

JOSEPH L. ATKINS,

Of Counsel for Appellee.

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a corporation, and
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APPELLEE'S SUPPLEMENTAL BRIEF

JOSEPH L. ATKINS,
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T. J. GEISLER,
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States for the District of Oregon.

APPELLEE'S SUPPLEMENTAL BRIEF

GENERAL COMMENT ON IMPORTANCE
OF THE INVENTION.

Before proceeding to argument upon the merits it is deemed to be in order to urge upon the attention of this Honorable Court, although the point is not raised by appellants, that the apparent simplicity of the device in

suit should not be taken to indicate that it is insignificant in importance.

The extent of the litigation respecting it, the persistency of appellants in clinging to the use of it, and the activity in the art to which it belongs, as set forth in the record, all afford evidence to the contrary.

ARGUMENT ON THE MERITS.

A review of the assignments of error, *seriatim*, appears in appellee's original brief.

So far as counsel is able to surmise appellants seek to reverse the Court below upon certain grounds submitted to be reversible, namely, that said Court erred:

I.

In the entry of the interlocutory decree.

II.

In denial of motion for a new trial.

III.

In finding that the device used by defendants after December 1, 1914, infringes the patent in suit.

IV.

In affirming the award of the Master.

Consideration of the foregoing four heads is bestowed each under the head as designated by the numeral above appropriated to it.

I.

Assignment of Error VII¹ (Transcript, p. 98) specifies error in the entry of the interlocutory decree. Appellee denies right of appeal from the interlocutory decree because appeal is taken too late.

The power of this Court to entertain an appeal from an interlocutory order or decree, granting or continuing an injunction appears to be derived from Act of Congress of March 3, 1891, C. 517, Sec. 7, 26 Stat. 828.

Said section reads:

“Provided, that the appeal must be taken within thirty days from the entry of such order or decree.”

Subsequent amendatory Acts do not materially modify said proviso.

The trial of this case below was held at the November term of the Court, on the first day of December, 1915 (Transcript, p. 47).

The date of entry of the interlocutory decree (Transcript, pp. 47-50) is not attached to it, and, so far as counsel has been able to discover, is not anywhere made affirmatively to appear. This would appear to be essential, but even so a subsequent order denying defendants leave to file proposed supplemental answer dated April 17, 1916 (Transcript, pp. 60-61), leaves no room for doubt as to the fact.

No appeal in this case was taken until March 22, 1917, after final decree was rendered (Transcript, pp. 92-93) and nearly eleven months after the last interlocutory order of the Court was entered.

It is, therefore, submitted that the action of the Court below in making interlocutory orders or decrees of record (Transcript, pp. 47-50 and 60-61) is not subject to review.

II.

DENIAL OF NEW TRIAL.

Refusal by inferior court to grant a new trial is not error.

Henderson vs. Moore, 9 U. S. (5 Cranch) 11.

“This Court does not think that the refusal of an inferior Court to receive an additional plea, or to amend one already filed, can ever be assigned as error.”

The Marine Ins. Co. vs. Hodgson, 10 U. S. (6 Cranch) 206.

Even if denial of a new trial by the inferior Court were reviewable, that denial herein, upon allegation of newly discovered evidence, was made in the sound discretion of the Court below, it being clear that such evidence, if evidence it were, was open to discovery by exercise of due diligence prior to the trial, and moreover, that if admitted it would be ineffectual.

The granting of a motion for a rehearing after a decree for an injunction and account, upon the infringement of a patent, “rests in the sound discretion of the judge who heard the cause or made the decision. This seems to be the general practice in the Circuit Courts of the United States.”

Am. Diamond Rock Boring Co. vs. Sheldon,
et al. 1 Fed. 870.

Applications for rehearing in patent cases based on alleged newly discovered anticipatory publication, should not be made the basis for new proceedings, unless strict rules are satisfied.

In re Gamewell Fire Alarm Tel. Co., 73 Fed. 908 (1 C. C. A.).

Motion for a rehearing on newly discovered evidence denied, in the absence of clear proof of anticipation of the patented article.

Kerosene Lamp Co. vs. Littell, Fed. Cas. 7723.

Upon a petition for leave to reopen a cause, and to file a supplemental answer setting up a newly discovered defense, after final hearing and decree, the evidence must be clearly such as would have availed the defendants if introduced on final hearing.

Collins Co. vs. Coes, 8 Fed. 517.

Upon an application for rehearing the validity of the patent being reargued in the light of some additional evidence as to the state of the art, but no reason being assigned for failure to produce this evidence at the hearing held, that the evidence would not be considered.

Burdsall vs. Curran, 31 Fed. 918.

A rehearing in a patent case will not be granted on the ground of newly discovered evidence of priority of invention, unless such evidence, if uncontradicted, would prove priority beyond a reasonable doubt.

Sacks vs. Brooks, 85 F. 970.

A defeated defendant in a patent suit cannot file a supplemental bill in the nature of a bill of review on the ground of newly discovered evidence, consisting of patents which could have been found, by proper search of the Patent Office, before the decree was entered.

Bennett vs. Schooley, 77 Fed. 352.

After an interlocutory decree for injunction, defendants cannot be allowed to amend their answer and take new proofs as to anticipations of the patent sued on, without proof of their previous diligence in preparing their case. The expression by their solicitor, in oral agreement, of his belief on the subject is insufficient.

N. Y. Filter Co. vs. O. H. Jewell Filter Co., 62 Fed. 582.

Reeves vs. Keystone Bridge Co., Fed. Cas. No. 11,661.

Before a motion to reopen a cause, and admit a newly discovered defense, after a final hearing, will be granted, it must be clear that such defense, if it had been made at the final hearing, would have been effectual.

Adair vs. Thayer, 7 Fed. 920.

A defendant applied for the opening of an interlocutory decree, sustaining certain patents and finding infringement, on the ground of newly discovered patents alleged to anticipate or limit those in suit, and for a rehearing of the case after the introduction of such additional patents; Held, that the application must be denied on three independent grounds; first, be-

cause it did not appear that any search prior to the hearing was made on the part of the defendant for patents germane or allied to those in suit according to their proper and usual location, arrangement and classification in the Patent Office; secondly, because it appeared by admission of the solicitors of the defendant that they had knowledge for more than a week before the signing of the decree of the existence of the alleged newly discovered patents and withheld that knowledge from the court until several days had elapsed after the decree was signed, although both parties by their solicitors were present before the court at the time and had knowledge of the formulation and settlement of the terms of such decree; and, thirdly, because from an examination of the patents sought to be introduced in connection with the expert and other affidavits and the record of the case, it appeared that those patents were immaterial so far as the result embodied in the decree was concerned.

Brill vs. North Jersey St. Ry. Co., 125 Fed. 526 (N. J.).

A petition to reopen a case after final hearing for the purpose of taking additional testimony to establish the alleged truth of a contention, will not be granted where the evidence could, by exercising proper diligence, have been produced at said final hearing.

Panzl vs. Battle Island Paper & Pulp Co. et al, 132 Fed. 607 (N. Y.).

See also

Providence Rubber Co. vs. Goodyear, 76 U. S. (9 Wall.) 805.

III.

Assignments of Error, I to VI inclusive, are conceived to be statements in different words amounting, in effect, to the single specification that the Court below erred: "In finding that the device used by defendants after December 1, 1914, infringes the patent in suit."

This proposition appellee denies, and, in support of that denial, submits, with some repetition from its original brief in order to make the present statement intelligible in itself, the following.

The validity of the patent in suit is admitted in the answer, and by appellants' counsel at the trial (Transcript, p. 23).

Infringement between November 3, 1914, and about the beginning of December, 1914, is admitted (Transcript, p. 15).

Infringement began in the wrongful appropriation of appellee's device (Transcript, p. 42), in order to deprive plaintiff below of a contract it had with the Court House of Multnomah County (Transcript, p. 17).

After issue of the patent in suit in November, 1914, upon advice of counsel, appellants, about December 1, 1914, made what they assume to call a change in their device. (Transcript, pp. 31-32.)

The "change" alleged, according to evidence for the defense, "effected no change in the device except to fasten the loose end of the chain to the basket."

"If we took the basket off that chain, we could still use it just as we did in the first instance, that is, if we put back the link in the lock." (Transcript, p. 39.)

Counsel for appellants at the hearing on appeal, it was understood, admitted in his closing argument that the real question involved in this appeal is whether infringement by defendants below of the patent in suit was avoided by the change solely in the manner of use of a device otherwise admitted to be an infringement.

Appellee denies that there was any change of the device after December 1, 1914, and the decision of the Court below is to the same effect.

But attention of the Court is invited to a decision of the Circuit Court, in D. Illinois, holding: "An infringement is not avoided * * * because the infringing device, by some colorable variation or expedient, merely impairs or narrows the function and usefulness of the device infringed."

Whitely vs. Fadner, 73 Fed. p. 486.

ANALYSIS CLAIM I OF PATENT.

To enable this Court to apprehend at a glance the issue, analysis of a claim of the patent in suit, selected for example only, is presented.

Claim 1, comprises the combination in a towel holder of four elements, as follows:

1. "A supporting member"—specifically the shelf 1 of the drawing.

2. "An assembling member adapted to secure towels in assemblage upon the supporting member"—specifically the member 4 of the drawing.

3. "A flexible retaining member cooperative therewith (with members 1 and 2 aforesaid) for the purpose specified"—specifically the flexible member of chain 19.

4. "Means for securing both ends of said retaining member to the assembling member"—specifically the padlock 7.

Examination of each claim of the patent, and particularly, for convenience, the said first claim, discloses beyond controversy that each covers a definite structure without any restriction as to use. The device of defendants below is an exact reproduction of that structure, and is precisely the same today as it was used prior to December 1, 1914, or as it was used at any date subsequent thereto.

PRIOR ART.

The art is of recent development, commencing, as it appears, about 1912, to meet the demand for a clean towel for each user in public lavatories in place of the old roller towel.

Each of the patents of record, save one, shows a device embodying a rigid member, or rod, adapted to hold the towels during their individual service, and to perform the additional function of guarding them against theft. The one function is intended to benefit the public (see Ordinance of the City of Portland below), the other the public servant or towel supplyman.

That the rod device is objectionable is made evident in respect to this case by the fact that defendants below after using it discarded it for the device of patent in suit. (Transcript, p. 40.)

The persistent use of plaintiff's device upon the part of defendants until restrained by injunction of the Court below is, it is submitted, sufficient evidence in

this case of the superiorability of the device covered by the patent in suit.

To quote the language of the Court in a similar case:

“The infringer’s conduct has been such as to preclude the belief that they have derived no advantage from the use of the plaintiff’s invention.”

Brennan vs. Dowagiac Mfg. Co., 162 Fed. 476.

THE REID PATENT.

The sole exception to the use of a rod, instead of a chain, shown in the art, is shown in the U. S. patent No. 1,067,622 to Guy Reid (Appellants’ Exhibit 7).

Despite the fact that the patent in suit, was issued over Reid, despite the fact that the validity of the patent in suit is admitted, and despite the admission of infringement, all as above set forth, appellants lay special emphasis upon the Reid patent, but for what reason does not precisely appear.

But because of the stress laid upon it, it is in order to note the clear radical differentiation between Reid’s device and that of the patent in suit. Reid merely substituted a chain of limited extent for the prior rod device, shown, for example, in the design patent to Rousso (Appellants’ Exhibit 5).

The one advantage of the chain to Reid is that by reason of its flexibility it conveniently admits of the engagement of his rod 1 with his lock 2 and its disengagement therefrom. A rod in the place of the chain in Reid would be impracticable. Nothing more of ad-

vantage is disclosed in the Reid patent or in the single claim thereof, than the one above noted, and that only by inference.

The patent in suit, on the contrary, discloses the novel idea of and means for uniting together both ends of a flexible member or chain. In other words, as set forth in the specification of the patent in suit (Appellee's Exhibit A, page 2, lines 93-96), THE RETAINING MEMBER (chain 19) CONSTITUTES "A CONTINUOUS EXTENSION OF THE ASSEMBLING MEMBER" (4).

Furthermore, means are provided for securing the ends of the flexible member together—specifically the lock 7. Reid shows none of the features last referred, and, even in view of the development of the art afforded by the patent in suit, cannot be made to include them.

There is no proof that the Reid device has ever been reduced to actual practice.

The patent stands alone in the record, unexplained by other evidence than what appears in the patent itself.

IV.

In the proceedings before the Master, voluminous testimony was taken and all points herein attempted to be raised were considered. The award of the Master was duly confirmed by the Court below.

It may be here observed that the compelling cause that operated upon defendants below to appropriate the device of the patent in suit was Ordinance No. 29,270, passed by Council of the City of Portland, July 29, 1914 (Transcript, p. 33), by virtue of which defendants were forced to find some means of compliance

with it that would enable them to continue the business in Portland. That the use of loose towels would have been practically prohibitive is established by undisputed testimony. (Transcript, p. 77.)

It is also to be observed that the efforts to prove defendants, profits in this case in lieu of damages were obstructed by the manifest evasions of the principal witness for the defense, W. C. H. Smith (Transcript, pp. 80-82, particularly 82), coupled with absence of any accounts (Transcript, p. 74, testimony of Amos Burg, defendant).

Enlarging upon citations made in its original brief (pages 18-19) appellee offers the following additional points and authorities:

Stranger cannot set up one patent as excuse for infringing another.

Cantrill vs. Wallick, 117 U. S. 689.

Evidence on an accounting under a decree in a suit for infringing a patent for wooden pavements, to show that there were other forms of wooden pavements open to the public which they might have used and made the profits or some portion of the profits which had been realized in the case of complainant's invention is incompetent.

Am., Nicholson Pavement Co. vs. Elizabeth, Fed. Cas. 309.

"Equally without foundation is the position taken by the appellants, that other pavements approaching in resemblance to that of Nicholson, were open to the public, and the specific difference between those pavements and Nicholson's was small, and that, therefore, the Nicholson patent was

entitled to only a small portion of the profits realized.

Nicholson's pavement, as before said, was a complete combination in itself, differing from every other pavement. * * * Thus combined and arranged, they (the parts) made a new thing, like a chemical compound. * * * It was this that the appellants used and, by using, made their profit, and prevented the appellee from making it. *It is not the case of a profit derived from the construction of an old pavement together with a superadded profit derived from adding thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety.*"

After a review of numerous patents cited and relied on by appellants to sustain their above position as denied by the Court, the Court says (3d paragraph, page 1004, L. C. P. Co. Ed.): "None of these pavements combine all the elements of Nicholson's, much less a combination of those elements arranged and disposed according to his plan. We think they present * * * no defense to this suit.

Elizabeth vs. Am. Nicholson Pavement Co., 97 U. S. 126; L. E. 24; 1000.

See also Hurlbut vs. Schillinger, 130 U. S. 472; L. E. 32; 1017.

In Burdett vs. Estey, 3 Fed. 566, the Court, observing that defendants might have used something else to nearly or quite the same profit, says: "they preferred to take the orator's invention. Having done that they are liable to account to him for what they gained by that taking, without

reference to what they might have gained if they had taken something else.”

Elizabeth vs. Pavement Co., 97 U. S. 126, *supra*, cited.

Respondents contending that complainants were not entitled to recover the entire profits because subject matter in suit infringes another patent and that the burden is on complainants to separate the profits, the court says:

“Aside from the question as to whether respondents’ pickers infringe the Mayo patent as well as that of complainants, there is another objection to this contention of the respondents that they are to be for that reason relieved from a portion of the damages claimed by the complainants, and that is that it has been the uniform practice of the courts to refuse to determine such collateral questions in suits where the validity and scope of a third party’s patent are not directly put in issue, and this finds direct support in the decision of the Supreme Court in McCreary vs. Pennsylvania Canal Co., 141 U. S. 459.”

Brinton vs. Paxton, 134 Fed. 78 (C. C. A. 3rd Cir.).

STATEMENT.

The above entitled cause having come on for hearing before this Honorable Court, and briefs having been filed on behalf of the respective parties, motion was presented on behalf of appellee to dismiss for want of compliance with certain rules of this Court. The motion

assigned for reasons to dismiss, first, that the Assignment of Errors filed on behalf of appellants does not, as Rule 11 requires, "set out separately and particularly each error asserted and intended to be urged;" second, that the brief filed on behalf of appellants does not comply with Rule 24 insofar as the rule (section 2) requires that it "shall contain in the order here stated—

(a) A concise abstract or statement of the case; presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon * * and state, as particularly as may be, in what the decree is alleged to be erroneous. * * * When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the Court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point."

The motion was also made to strike or exclude from the record certain matter designated therein, as irrelevant to any issue before this Honorable Court.

The Court upon the hearing of said motion did not rule upon the motion, but announced, as counsel for appellee understood, that it is not the practice here to dismiss for failure to comply with the rules; and proceeded to hear the case, granting to appellee, nevertheless, permission to file a supplemental brief.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

Inasmuch as counsel for appellee has been unable to find, and counsel for appellants failed to produce a prior decision of this Court outlining the practice in this Circuit respecting the necessity of observance of the rules, counsel, in view of the action at the hearing, respectfully requests this Honorable Court to rule upon the motion presented, or to make citation to ruling in a former case, if one there be to cover the several points embodied in said motion.

In that connection, counsel, craving the indulgence of the Court touching his admitted ignorance of any details of practice under the rules in this Circuit that are in point and that differ from the practice which obtains in coordinate jurisdictions—an ignorance upon which he has in vain sought enlightenment—begs to submit the following citations to precedents in other circuits in support of his motion to dismiss. Otherwise his action in making the motion to dismiss might invite disapprobation.

Justification for bringing the motion to dismiss was, in the absence of better knowledge, found in the following citations:

“The practice shall be the same as in the Supreme Court of the United States, as far as the same is applicable.”

Rule 8, 9 C. C. A.

Rule 21, U. S. S. C. and Rule 24, 9 C. C. A.
are substantially identical.

Rule 35, U. S. S. C. and

Rule 11, 9 C. C. A. are likewise substantially identical.

Strict obedience to all rules (specifically Rule 21), insisted upon.

School District No. 56 vs. St. Joseph Co., 101 U. S. 472 (11 Otto).

Too general assignment of errors insufficient.

Van Stone vs. Stillwell & Bierce Mfg. Co., 142 U. S. 128.

“Appeals are subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.”

Farrar vs. Churchill, 135 U. S. 609.

Court will not notice alleged error in admission or exclusion of evidence not set out substantially as required by Rules 11 and 24.

Haldane vs. U. S., 69 Fed. 819 (8 C. C. A.).

Violation of rule requiring assignment of errors condemned by Mr. Justice Miller.

Phillips vs. Seymour, 91 U. S. 646.

Dismissal for want of compliance with rule as set out in motion herein.

Benites vs. Hampton, 123 U. S. 519.

Portland Co. vs. U. S., 15 Wall. 1-3.

Assignment cannot be good under Rule 11 if it is necessary to look beyond

its terms for a specific statement of the question sought to be presented.

Grape Creek Coal Co. vs. Farmers' Loan & Trust Co., 63 Fed. 891 (7 C. C. A.).

McFarlane vs. Golling, 76 Fed. 23 (7 C. C. A.).

Rule 11, requiring assignment of errors to set out "separately and particularly each error asserted," sustained.

Deering Harvester Co. vs. Kelly, 103 Fed. 261 (6 C. C. A.).

Chandler vs. Pomeroy, 96 Fed. 156 (3 C. C. A.).

Assignments that the judgment is contrary to law, contrary to the evidence, contrary to the preponderance of the evidence, cannot be reviewed.

Smith vs. Hopkins, 120 Fed. 923 (7 C. C. A.).

See also U. S. vs. Lee Yen Tai, 113 Fed. 465 (2 C. C. A.).

Brief should, under Rule 24, conform substantially to the particular assignment of error on which it is based. Enforced.

Vider vs. O'Brien, 62 Fed. 326 (7 C. C. A.).

"Errors not specified according to this rule will be disregarded."

Rule 24, Sec. 4.

Rule will be enforced.

City of Lincoln vs. Sun Vapor Street Light Co., 59 Fed. 756 (8 C. C. A.).

Vider vs. O'Brien, 62 Fed. 326 (7 C. C. A.).

Specifications of error aimed at the opinion of the Court, and not at the decree rendered are bad.

Caverly vs. Deere, 66 Fed. 305 (C. C. A.).

Russell vs. Kern, 69 Fed. 94 (C. C. A.).

Davis vs. Packard, 6 Peters 41.

In the following case decided by the Circuit Court of Appeals for the 7th Circuit, upon an assignment of error reading:

“The Circuit Court erred in holding that respondents have not infringed upon the patent in suit, and it erred in declining to grant a provisional injunction,” etc., the Court says:

“The one thing done by the Court was to dismiss the bill, and on that action the assignment should have been predicated.”

Clark vs. Deere & Mansur Co., 80 Fed. 534.

MOTION TO STRIKE.

Motion to strike out certain matter from the record relating to motion made by plaintiffs below for a new trial, is believed to be amply supported by the following authority:

If no other documents than such as were before the inferior court upon the application for a new trial, court cannot look into them on writ of error.

Kerr vs. Clappitt, 95 U. S. (5 Otto) 188.

Respectfully submitted,
JOSEPH L. ATKINS,
Counsel for Appellee.

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

BROADWAY TOWEL SUPPLY COMPANY,
a corporation, and
AMOS BURG,

Appellants,

VS.

BROWN-MEYER COMPANY,
a corporation,

Appellee.

Filed

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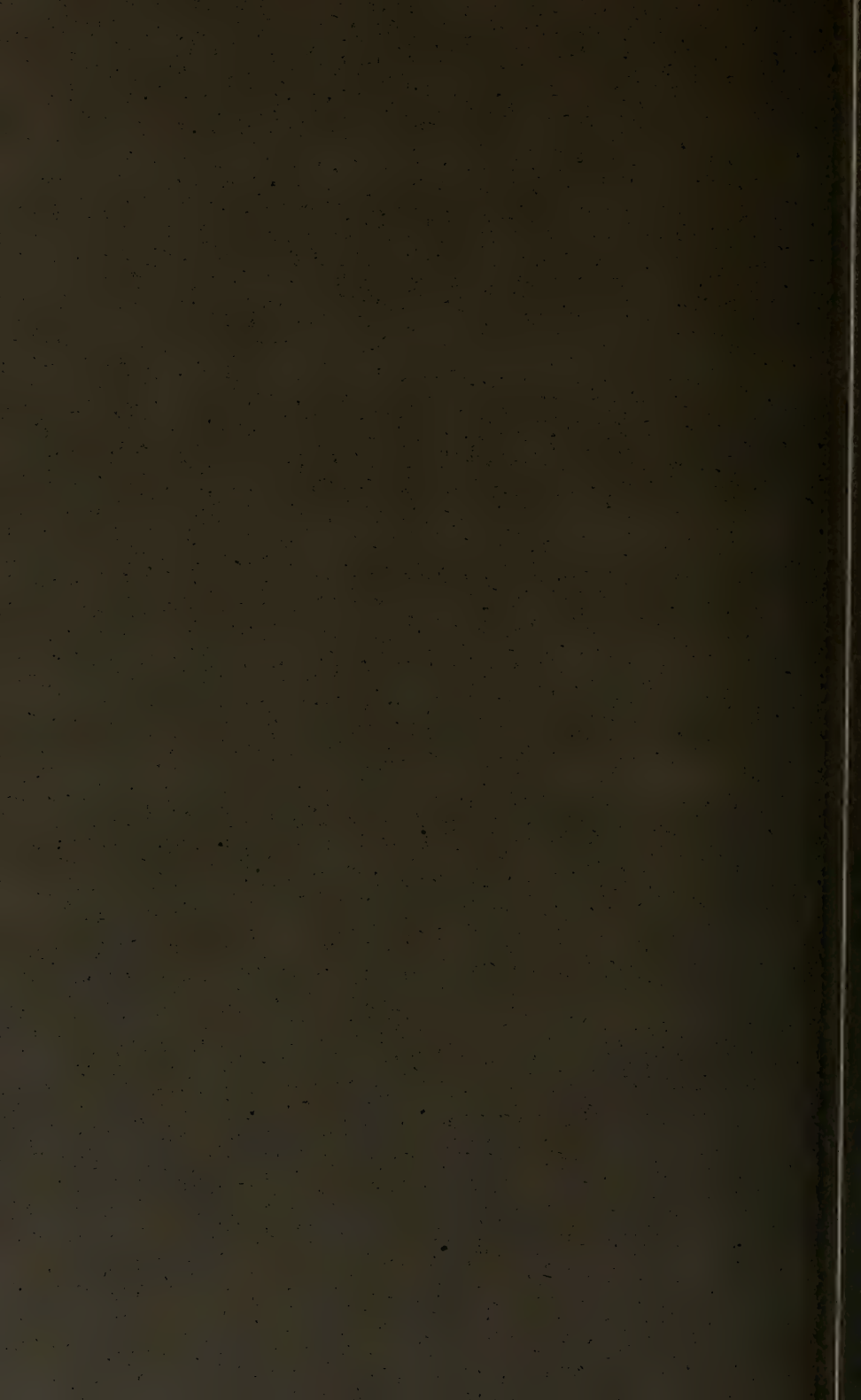
Clerk

On Appeal from the District Court of the United
States for the District of Oregon.

APPELLANTS' REPLY BRIEF TO APPEL-
LEE'S SUPPLEMENTAL BRIEF.

T. J. GEISLER,
of Counsel for Appellants

JOSEPH L. ATKINS,
Counsel for Appellee



IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

BROADWAY TOWEL SUPPLY COMPANY,

a corporation, and

AMOS BURG,

Appellants,

vs.

BROWN-MEYER COMPANY,

a corporation,

Appellee.

No. 2971

On Appeal from the District Court of the United
States for the District of Oregon.

**APPELLANTS' REPLY BRIEF TO APPEL-
LEE'S SUPPLEMENTAL BRIEF.**

ON THE MOTIONS.

Surely the questions to be reviewed are very plain. Appellee, in interjecting non-essential technicalities, and insisting that this court primarily deal with such, merely imposes useless labor.

Appellee's counsel was consulted in the preparation of the record, knew fully every point and step, and stipulated all over his own signature. Even stipulated as necessary the very papers he would now strike out of the record. See appellee's typewritten motion to dismiss, page 3, and compare stipulation of parties on page 100 of Transcript.

In regard to appellee seeking enlightenment on the details of practice of this circuit, appellants submit:

All rules of law and practice were, and are, intended to promote the administration of substantial justice; never to thwart such result.

Counsel for appellee has answered his own question when he states in his Supplemental Brief, page 17, that the rules of this circuit provide (rule 8) that "the practice shall be the same as in the Supreme Court of the United States as far as the same is applicable."

The spirit of promoting substantial justice pervades the whole equity fabric of our federal courts.

The Equity Rules established by the Supreme Court provide (rule 19) "The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

To the same end the Rules of Practice of the Supreme Court (rule 35) as well as all circuit courts of appeals, have a provision like the last clauses of rule 11 and rule 24:4 of this circuit, to the effect that "the court, at its own option, may notice a plain error not assigned."

In speaking of this provision in the case of *Mast & Co. v. Superior Drill Co.*, 154 Fed. 45, the C. C. A. 6th Cir. said (p. 51): "The underlying purpose of this reservation * * * is to prevent the miscarriage of justice from oversight."

Furthermore, appellee's complaint about the assignments of errors is mere quibbling.

The object of "assignment of errors is to enable the court and opposing counsel to see on what points the appellants intend to ask reversal of judgment, and limit the discussion to those points." *Phillips v. Seymour*, 91 U. S. 646, 648.

It is submitted that the assignments in this case, taken as a whole, have well fulfilled their office.

Take for example Assignment I (Trans. 96). This squarely and according to rule, raises the question of infringement.

In *Wessell v. United Mattress Mach. Co.*, 139 Fed. 11, 16 (C. C. A. 6th Cir.), the assignment of error was:

"The court erred in not dismissing the bill of complaint." It was said to be too general. The C. C. A. said "If this be so, we think the error is plain, and that we may, in the exercise of our discretion, *and ought to*, notice it. This defense was distinctly raised by the answer, the issue is *vital to the merits* of the controversy, and the case cannot be rightly decided without averting to it."

In a later case, *Lord Baltimore Press v. Labombarde*, 197 Fed. 739, the C. C. A. 4th Cir. reviewed similar questions as here presented by appellee.

The errors assigned were:

"1. The decree that defendant had infringed the patent; 2. The holding the patent to be valid."

Appellee moved to dismiss appeal because assignments did not conform to rule 11 of that circuit, presumably the same as like rule of this circuit.

The court—after referring to necessity for observing such rule, and that it had no intension of relaxing in its enforcement—said:

“We must, however, draw a *distinction between ordinary and patent cases* where the assignments are (a) the upholding or invalidating the infringement, and (b) the ascertainment of either infringement or non-infringement. In such cases, we cannot say that the assignment does not clearly and fully meet the requirement of the rule, when it alleges that the court below erred in holding the patent valid or invalid, or that infringement existed or did not exist. It is true such assignments require full and complete study of the whole record; but, in a patent case, where these defenses are relied on, such complete examinations of the record becomes a necessity.

* * * Therefore, in this case we must hold that the two first assignments are properly made.”

And assignments XI and XII (Trans. 98) present duly and fully, by themselves, the errors complained of in the proceedings in the court below after the interlocutory decree. The errors charged are in awarding the plaintiff more than nominal damage, if any, on the evidence presented.

These assignments read:

XI.

In overruling the defendants' exception I to the report of the Master on accounting. The exception referred to fully states the reason therefor. Trans. 86.

XII.

In overruling the defendants' exception III to the report of the Master on accounting. Trans. 90.

Like exceptions have been approved by the C. C. A. 8th Cir. in *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 163 Fed. 34, 35, holding:

“The Master had found in favor of the appellee the profits which it would have made * * * To this finding the appellant company excepted. This exception imposed on the lower court, and the assignment of that court’s ruling against the exception imposed upon this court, the duty of considering the evidence carefully to see if there was any legal evidence to support this finding.”

ON THE MERITS.

The repeated assertions of appellee that appellants admitted the validity of the patent in suit have impressed appellants that appellee is evidently nervous on this question.

The fact is, appellants did not admit, but denied that Brown had invented anything. Answer I, Trans. 7.

The further fact is, appellants really were not interested, because the alleged improvement over the prior art, purported to be covered by the patent in suit, is trivial. Even the customers of appellee laundry were not interested. “The customers are interested simply in the delivery of clean individual towels and the price.” Meyer’s Test., Trans. 77.

The remarks of the C. C. A. in *Wessel v. United Mattress Mach. Co.*, 139 Fed. 11, 16, apply:

“It is not necessary to determine whether these claims in the patent in suit are valid or not; that without the limitation by the specification, they are too broad; that they may be thus limited and construed to intend the specific devices described, and when so limited they are not infringed by the appellants.”

It is further to be said that appellants acted upon the facts disclosed by the File Wrapper of the patent in suit. Appendix to Trans., p. 105; see particularly pp. 109, 110. As there stated: "Claim 1 of the patent (originally claim 3, see Trans. 120, 121) calls for a combination in which both ends of the chain are secured to the assembling member or member 4. Reid shows no such construction. The inclusion of the wall by construction cannot be made in respect to claim 3, because applicant's assembling member 4 corresponds in *function* to Reid's number 1 and 1a. There is *distinct utility* in the subject matter of claim 1 (3) in that it *renders the entire length of the looped chain* available to the user of a towel, while the reach of the Reid's chain is much restricted." (Trans. 110.) See also comparative illustrations, appellants' Brief, p. 6.

Note: *The looped chain is THE DIFFERENTIATION, and the rendering of the entire length of the looped chain available is THE FUNCTION.*

Appellee now, in its Supplemental Brief, p. 10, contends:

"Examination of each claim of the patent, and particularly, for convenience, the first claim (the one just referred to) discloses beyond controversy that each covers a definite structure *without* any restriction as to *use*."

This assertion, that claim 1 covers merely a definite *structure*, without any restrictions as to *use*, is *contradicted* by the claim itself, which includes the functional limitation *for the purpose specified*." Trans. 106.

When appellants dropped the lower end of their towel stringing chain from the lower end of the towel assembling post to the bottom of the basket, they put their device into the very condition of the prior Reid

device which is said to *lack*—the great desideratum Brown discovered.

After said change of appellants' device, both ends of the chain were no longer secured to the towel-assembling member or post, and without such arrangement the *functional result*, alone due thereto was *not obtained*.

That is what the patentee impressed upon the Examiner of the Patent Office, and it was such differentiation which alone induced the Examiner to allow the application for patent.

It is apparent from the File Wrapper that there was a fair issue raised in the Patent Office, "requiring the applicant to yield directly a portion of what he claimed."

Reece Button-Hole Mach. Co. v. Globe Co., 61 Fed. 958, 969, C. C. A. 1st Cir.

"The position of the Patent Office was thereby discussed, and was fully understood by the applicant. It cannot be questioned that the issues made by it were substantial, and not incidental, while the invention is of a narrow and doubtful character, and necessarily to be carefully limited; so that the patentee must be held to the results of the proceedings on his application, and be restricted thereby."

Millard v. Chase, 108 Fed. 399, 402, C. C. A. 1st Cir.

Said definite structure, and for said functional purpose, cannot be eliminated from the claims without eliminating also the only feature possibly patentable, and rendering the whole patent void.

The question as to whether the Brown towel rack really embodies such improvement as may be legally termed a patentable invention, appellants submit to this

court without further argument. Even though appellee has not pressed that question, appellee cannot forbid this court from examining into the same.

Millard v. Chase, 108 Fed. 398, 401.

As said by this court in U. S. Consol S. Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 268:

"Inasmuch as these matters *concern the public at large* the court will not allow parties to frame their issues in such a way as to take from it the scrutiny of all the questions which may be involved."

The prior Reid device seems to present the only real substance in these towel racks. This device substituted the flexible chain for the stiff rod formerly used, also provided practical means for connecting and disengaging the chain, as in substance admitted in the last paragraph, page 11 of appellee's supplemental brief.

THE REAL QUESTION IS, shall the injustice imposed by the decree of the lower court upon appellants be permitted to stand. Shall they be prohibited from using, and punished for having used, simple, everyday devices, merely because the appellee has ingenuously obtained an unintended and unlawful construction of the patent in suit?

Appellee tries to impugn the actions of appellants in their use of their device after its change to avoid infringement, by referring in its brief, page 8, to the fact that appellants' witnesses admitted on the stand that their device *might* be arranged so as to be like the Brown device.

But the fact remains that the good faith of appellants was never questioned.

Meyers, of appellee laundry, testified, Trans. 19: After December 1, 1914, "the lower end of the chain

was removed from the shackle of the lock, the lock was merely used thenceforth to keep the post in place—(note, just as in the Reid device) and the lower end of the chain instead of being in anyway connected with the shackle of the lock, or the bottom end of the post, was fastened to a ring in the basket.”

And this state of appellants use of their towel rack continued ever afterwards, as stipulated by appellee in court (last paragraph, Trans. 30), and again before the Master, Trans. (middle of page 82).

There was nothing unfair about appellants’ actions in any respect. The getting of a customer from appellee was merely due to fair competition. Trans. 78.

In short, appellants neither intended, nor used their device, when rearranged, to accomplish the same *function* as that claimed for the device described in the patent in suit. Such functional result appellees still monopolized without interference by appellants.

And the brief use of appellants’ towel racks in their original form is too trifling, it is submitted, to impose more than nominal damages. For such, appellants offered a fair settlement to appellee, before this suit was brought, in order to avoid litigation. See Answer, Trans. 11. And see testimony of Burg, appellant, Trans. 33-34, and note the unreasonable demand of appellee, Trans. 30. Appellant laundry made only \$7.50 on their entire towel business during that period, but offered \$25.00 to satisfy appellee and avoid litigation. But appellee magnanimously demanded \$500.00. Trans. 30.

This whole controversy is due to appellee attempting to make a wrongful use of its alleged patent. It used the patent law, intended primarily “to promote the progress of science and the useful arts” (Motion Pic-

ture Co. v. Universal Film Co., U. S. Supreme Ct. 238 O. G. 311, 313) for unlawful purpose. Appellee seeks to convict an innocent user, by bringing him into the *letter* of a patent, though *contrary to its true intent*.

This conduct recalls the remarks of the Supreme Court in *Atlantic Works v. Brady*, 107 U. S. 192, 200. The appellee by its conduct brings itself "in a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies, which enables them to lay a heavy tax upon the industry of the country, (in the case at bar, *taking all profits* from appellants' business of laundering and supplying individual towels) without contributing to the real advancement of the art."

Appellants' counsel apologizes for seeming proximity on so simple an issue as here presented. But if he transgressed, he did so in his endeavor to lighten and facilitate the work of the court, and to save his clients from injustice.

Respectfully submitted,

T. J. GEISLER,

Of Counsel for Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BROWN-MEYER COMPANY, a Corporation,
APPELLEE

VS.

**BROADWAY TOWEL SUPPLY COMPANY, a
Corporation, and AMOS BURG**
APPELLANTS

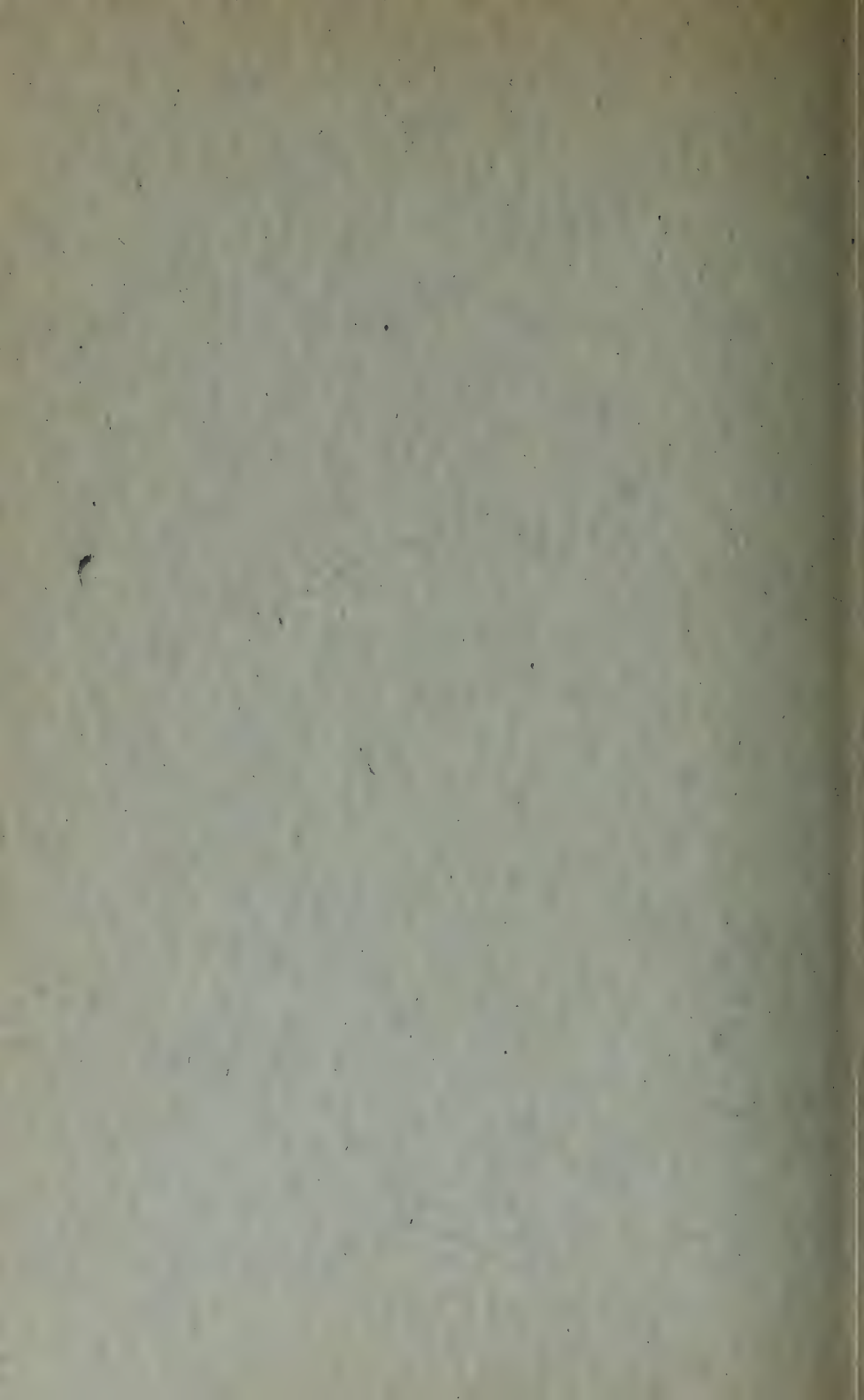
Petition for Rehearing

JOSEPH L. ATKINS,
Counsel for Petitioner

Filed

SEP 20 1907

F. D. Mondrton,
Clerk.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BROWN-MEYER COMPANY, a corporation,
Appellee,

v.

BROADWAY TOWEL SUPPLY COMPANY,
a corporation,
and AMOS BURG,
Appellants.

Petition for Rehearing

*To the Honorable, the United States Circuit Court
of Appeals for the Ninth Circuit:*

The appellee petitions the Court to grant a rehearing in the above entitled cause, and respectfully represents that the Court in its opinion and decision erred upon the following points, to wit:

I. In holding that infringement committed by appellants extended only from November 3 to December 1, 1914.

II. In holding that appellants made any material change in their device between November 3, 1914, and February 28, 1916.

III. In denying appellee the benefit of the doctrine of equivalents.

IV. In holding that the combination described in the Reid patent of record contains all the elements of the appellee's combination, with the single exception that in the Reid device the lower end of the chain is brought back and fastened by a staple to the wall beneath the standard.

V. In holding that all Brown added to Reid's device was to detach from the wall the lower end of the chain and bring it higher and attach it to the lower end of the standard by means of a padlock.

VI. In assigning to the Brown patent sued upon a narrower scope than that to which its claims entitle it, and holding that appellee depends on a single limited feature.

VII. In holding that Brown in his application made claims broader than those of his patent and that the Patent Office rejected them.

VIII. In holding that appellants' device lacks the element which is the distinguishing feature of Brown's invention.

IX. In holding, if it does so hold, that the principles announced in *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, are applicable to an accounting in this case.

I.

This petition might stand solely upon the ground that the holding that appellants' device was changed after December 1, 1914, contradicts the record in the case.

Amos Burg, one of the appellants and president also of the corporation appellant, says (Record, lower half of page 39) :

"I made no change in the device except to fasten the loose end of the chain to the basket.
. . . . We discontinued making the fastening to the lock, and *we used the same device* in every other respect as we had used it before.

"If we took the basket off that chain we could still use it just as we did in the first instance, that is, if we put back the link in the lock."

W. C. H. Smith (Record, page 29) testifies :

"After issue of patent in suit I made this change of disconnecting the lower end of the chain from the bottom of that post and dropping it into a basket, fastening it to a basket."

The main fact urged in support of this petition is further established by every witness, admitted by opposing counsel, and found by the Court below.

II.

The only change alleged was not in the device itself, but in the manner of using it, which was as set forth in the answer of Amos Burg, *supra*.

The use as practiced by appellants before December 1, 1914, and as practiced by them after that date was of the same device, for the same purpose, and to the same end.

Such variation of use does not come under the doctrine of equivalents, and scarcely rises to the dignity of a "double use." It is rather a diminished use with diminished utility.

To make it possible, logically, to apply the doctrine of equivalents it is essential that there be at least two objects for comparison. Structurally considered, appellants' device has been always single and identically the same.

Even double use, if made out, does not avoid the charge of infringement.

That an inventor is entitled to every use to which his invention may be applied is an elementary doctrine and well established by numerous cases, from which the following are selected.

Union Stone Co. v. Allen, 14 Fed. Rep. 353.

Stowe v. Chicago, 104 U. S. 547, 26 L. Ed. 816.

Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267.

The decision of the Court below is conformable to the decision of the Supreme Court in *Western Electric Co. v. La Rue*, 139 U. S. 601, 35 L. Ed. 294, which in part reads as follows:

“the application of the patented device to *another use* (italics mine) where such new application does not involve the exercise of the inventive faculty, is as much an infringement as though the new machine were an exact copy of the old.”

In the case before the Court appellants' machine as it existed after December 1, 1914, is not only “an exact copy” of the machine as it existed before that date, but is actually the same machine, neither more nor less.

“A machine that infringes part of the time is an infringement, although it may at other times be so operated as not to infringe.”

Wright Co. v. Herring-Curtiss Co., 211
Fed. Rep. 654.

“Structure and not results the test. Defendants should not be allowed to evade a claim of infringement by saying that, while they make use of the idea of the complainants in part they do not use it to the fullest extent.”

Kimball v. Waters Metal Const. Co., 177
Fed. Rep. 239, *vide* page 247.

The circumstance of a difference in use must be regarded as an immaterial difference.

The Court, Butler, J., enlarging upon this point, says:

“If not the evasion of the patent, and, indeed, of all patents would be easy. Nothing more would be necessary than to waive an immaterial part of the benefit derived from the invention. . . . The manner in which the machine is used does not affect the question. The manner of using does not characterize the machine. This is done by its structure and its capabilities.”

Sewing Machine Co. v. Frame, 24 Fed.
Rep. 599.

To the same effect from among numerous ones the following cases are selected:

Penfield v. Chambers, 92 Fed. Rep. 630 (C. C.
A. 6 Cir.).

King v. Hubbard, 97 Fed. Rep. 795,

Citing Sewall v. Jones, 91 U. S. 171;

Coupe v. Weatherhead, 16 Fed. 673;

Machine Co. v. Binney, 24 Fed. Cas. 653.

III.

The opinion of the Court in effect absolutely denies appellee the benefit of the doctrine of equivalents, and appears to incline towards the old doctrine that only the pioneer patent is entitled to invoke the doctrine of equivalents.

That view, it is submitted, is directly in the teeth of the decision of the United States Supreme Court,

Paper Bag Case, 210 U. S. 405, 52 L. Ed. 1122,
and cases cited therein.

In that case the Supreme Court has, as Judge Quarles observes, (Commercial Acetelene Co. v. Avery, 166 Fed. Rep. 917) corrected that erroneous view of the law "and awards to every meritorious inventor the benefit of the doctrine of equivalents."

In the Paper Bag Case, *supra*, the Court says, in respect to erroneous constructions placed upon its former decisions, "it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents."

It has been insisted in the foregoing that the facts in this case are not such as to demand or even permit the application of the doctrine of equivalents; but, nevertheless, that doctrine is again referred to, because the consideration given by the Court to it appears to have given a bias to the mind of the Court.

It is not to be assumed that the Court was unmindful of the rule laid down in the Paper Bag Case, but only that it regarded the case at bar as an extreme one under that rule.

For that reason, and particularly because appellee has hitherto had no opportunity to controvert the points advanced in the opinion of this Honorable Court, this petition is presented and argument at greater length than the rule invites is herein offered.

Your petitioner prays, therefore, and because the opinion of the Court presents a case not made by opposing counsel at the hearing, that all the points herein presented may receive the patient consideration of this Court.

IV.-V.

The decision of the Court appears to hinge upon the following proposition (Opinion of the Court, page 3) :

“All that Brown added to Reid’s device was to detach from the wall the lower end of the chain and bring it higher and attach to the lower end of the standard by means of a pad-lock.”

This statement, it is submitted, does not set forth the facts, which are as follows.

The prior art shows, as in the Rousso Design Patent of April 9, 1912, for example, substantially all that Reid has, except Reid’s chain 5. Reid saw the advantages of a chain, but to use it he sacrificed, on the one hand, the utility of his device in another direction, and he did not, on the other hand, discover how the chain could be utilized to best advantage.

The towel-retaining rod shown in the Rousso patent, disregarding its serious defects, may, if locked in place, afford at least one means of secure assemblage of the towels upon it, without impairing the means for stripping off the soiled towels. Reid, in devising means to lock his bar 1^a to his shelf 7, provided no means for stripping off the soiled towels except backward over the bar 1^a. To do this one must lift off the towels from the lower end of the

chain and manipulate them in order to slip them around the crooked or gooseneck of that bar.

The Brown device permits the towels to drop off the lower end of the chain and minimizes over all other earlier devices the time required for delivery of the towels. The item of time in delivery is obviously a major consideration, and particularly in view of the estimate offered by appellants that two wagons were necessary in their small business (see Record, page 74). That fact alone will sufficiently account for appellants' persistent use of the Brown device in preference to any other.

The superior utility of the chain over the rod is testified to by appellants' witness Clancy (Record, page 41).

The question of the superior utility of appellee's device was not entered upon at the trial. Doubtless, both parties recognized the rule laid down by the Supreme Court in *Lehnbeuter v. Holthaus* (105 U. S. 94, 26 L. Ed. 939), namely:

"The fact that it has been infringed by defendants is sufficient to establish its utility, at least as against them."

But differences, other than those above pointed out, between the Reid device and the Brown device in suit are radical.

Brown shows and claims a chain securely locked to a shelf. Reid shows one only partially locked to a shelf. Reid shows a chain locked at one end only.

Brown shows a chain having both ends locked together.

The important advantage, moreover, of a greater sweep of chain is thereby obtained and demonstrated for the first time. This is not denied by appellants (Record, page 25), but they claim that Reid's device might by adjustment be made to afford the same sweep. This comparison, made after the Brown invention was made, is not a fair one, even if the fact alleged were true, which is denied. Brown was the first to discover a new utility and provide means to effect it.

Reid's device demands, and his single claim calls for a special kind of lock. Brown does not use Reid's combination, but taking some of the elements in common use employed by Reid adds to them to produce a new combination. He extends his member 4 through the shelf 1, to accommodate in it an aperture 9 below the shelf, and employs "means" (a padlock 7) to complete the novel combination. If the Reid device even suggested any *means* whatsoever by which it were possible to detach his chain from the wall "and attach it to the lower end of the standard by means of a padlock," the patent in suit would never have issued with claims 1 and 2, and this suit would not have been brought.

VI.

The immediately preceding assertion that claims 1 and 2 would not have been allowed is made advisedly, upon the clear apprehension of the invention

manifested by the examiner in charge of the application upon which the patent issued.

Upon first action, it is true, he rejects the claims of the Brown patent, but subsequently he admits his error and reverses himself. The claims of the patent are precisely claims 3, 4, 9 and 10 of the application as filed, without any amendment.

“The final granting of the claims allowed strengthens rather than weakens the patent.”

U. S. Fastener Co. v. Bradley, 143 Fed. Rep. 529, last paragraph.

“While an applicant may by his action impose any limitations upon a patent, it is a corollary of this proposition that if the applicant successfully defends his position and secures the assent thereto of those in the Office having charge of the application, and the patent issues notwithstanding the objection which had at one time been urged, the patent is not subject to diminution on that account.”

American Stove Co. v. Cleveland Foundry Co., 158 Fed. Rep. 983 (C. C. A. 6 Cir.).

“A claim is not to be limited by construction in view of proceedings in the Patent Office with respect to features which were not subject to discussion or amendment.”

Haskell Golf Ball Co. v. Perfect Golf Ball Co., 143 Fed. Rep. 128.

The facts in this case are luminous upon the point decided.

In that case the Court quotes from *Bundy Mfg. Co. v. Detroit Time Reg. Co.*, 94 Fed. Rep. 524 (C. C. A.), as follows:

“To be estopped by the action of the Patent Office, a patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed.”

The cases to like effect are very numerous, for example:

Diamond Drill Co. v. Kelly Bros., 120 Fed. 282.

Levy v. Harris, 124 Fed. 69.

Wagner v. Wyckoff, 151 Fed. 585.

Seeger v. American, 171 Fed. 416.

Beryle v. S. F. Cornice Co., 181 Fed. 692.

Gen. Elec. v. Freeman, 190 Fed. 34.

Hall v. Teabout, 205 Fed. 906.

Rolleman v. Universal, 207 Fed. 97.

O'Brien-Worthen v. Stempel, 209 Fed. 847.

Crown v. Sterling, 217 Fed. 381.

Hess-Bright v. Fichtel, 219 Fed. 723.

Veneer Mch. Co. v. G. R. C. Co., 227 Fed. 419.

Kistner v. Atlantic, 230 Fed. 829.

Frey v. Marvel, 236 Fed. 916.

VII.

The file-wrapper makes no such showing in the present case as should restrict the scope of the claims of the patent, but makes a contradictory showing. The only claims entitled to consideration that were erased while the Brown patent was pending were original claims 1 and 2 of Brown's application. A sufficient objection to them was made by the examiner (Record, page 112) that they were "indefinite in terms." The examiner adhered finally to that ground of rejection (Record, page 119). Claims 3 and 4 were thereupon decided by Brown to be of sufficient breadth if construed to meet the limitations imposed by the prior art only, and they were accepted (Record, pages 120-121). Care, however, was taken by counsel to avoid implied limitation, by authorizing their erasure "without prejudice" (Record, page 121). This was not done under the impression that it would avail against an actual surrender of any rights, but only to guard against the situation that now presents itself, namely, a limitation by construction, and the imputation of an intention to surrender anything where no such intention obtained.

Both claims 1 and 2 of the patent are broadly drawn, the first to a combination embracing "means for securing both ends of said retaining member to the assembling member." The second is differentiated from the first by means for "detachably" securing the same.

By the allowance of a claim within the breadth

of the term "means" the Patent Office concedes (as this Court has held in *Directory Co. v. Polk*, 121 Fed. Rep. 742) that scope to the invention for which appellee now prays recognition. To reduce that term by construction to a mere padlock is to do violence to the very language employed. Nevertheless, even if the language of the claim did limit it to a padlock, it would still define precisely what appellants used from December 1, 1914, to February 28, 1916.

The proposition advanced in the opinion of the Court, that "a claim cannot be so construed as to cover what was rejected by the Patent Office," however sound in law, does not apply in this case.

Appellee asks for no such construction. Claim 1, for instance, of the patent only puts into definite terms what original claim 1 of the application expressed, according to the examiner, in indefinite terms. It would involve a contradiction of terms to say that an accepted definition deviates from an indefinite statement!

To use the language of the Court in *Bundy v. Detroit*, *supra*, Brown surrendered nothing in order to obtain said claim 1 of his patent. He merely elected to accept that claim in the face of the examiner's objection that other claims were indefinite.

There is no doubt that the law is precisely as laid down by the Court upon reference to *Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co.*, 135 Fed. 783; but it is equally clear that if appellants' device had been existent before that of ap-

pellee, and evidence of that fact had been before the examiner while in charge of the Brown application, he would have unhesitatingly and properly rejected the Brown application upon appellants' device.

To have done so would be in accord with the elementary practice of the Patent Office.

VIII.

The proposition set forth in the opinion of this Court (page 5, lines 16-19) "that the appellants' device lacks the element which is the distinguishing feature of Brown's invention," is contradicted, as set forth at the outset, by the record.

It is not true that appellants' device lacks any element that belongs to the Brown invention. The Court has been misled as to the facts. Upon the state of facts assumed its conclusion is sound, but the material fact is wanting.

It is because of that mistake that counsel feels himself constrained by a sense of duty to this Court and to the Court below to present this petition as being the only course open to him by which to put the Court upon notice of its mistake.

IX.

If it be held that the principles of the *Dowagiac Mfg. Co. v. Minn. Plow Co.* apply to this case on accounting, it must be so held under Sections IV. and V. of this brief. It is presumed that the one holding will stand or fall with the other.

SUMMARY.

The action of this Honorable Court, insofar as it reverses the Court below, works great hardship upon an innocent party whose every act entitles it to the benign consideration of a court of equity.

The subject-matter of the patent in suit was invented by Brown to enable appellee to provide sanitary towel-service in Portland, Oregon, in obedience to a public demand. Before the patent in suit issued to appellee, appellants appropriated the invention (see Record, page 28) to the injury of the appellee, and continued to use the same after notice of patent till December 1, 1914. At that date a change, not alleged to be more than a change of use, was made, and appellants continued to use the identical devices which they had used before December 1, 1914, until February 28, 1916, when they were enjoined by the Court below.

Appellee relying, as it believed it had good reason to do, upon repeated assurances, upon the grant of the patent, upon the recognition of its validity by appellants, and finally upon the decree of the Court below, has been put to great expense in the effort to protect its rights as secured by the patent in suit.

By the action of this Honorable Court the validity of the patent is recognized to the extent only of an empty decree that gives it, in effect, a twenty-eight day patent in lieu of a patent for the term of seventeen years conferred by the grant. In substance, it dissolves the injunction.

Your petitioner must conclude from the action taken in this case that this Honorable Court has gained a mistaken apprehension of the nature of the invention which constitutes the subject-matter of the patent in suit, and perhaps of the relationship subsisting between the parties and their rights.

A close analysis of the opinion of the Court tends to lead to the conclusion that this Court holds the said invention in esteem far below its merits.

The value and importance of the invention have never been seriously questioned. The presumption of utility in consequence of the grant, is fortified by the conduct of the appellants, which has been such as to preclude the belief that they have derived no advantage from the use of appellee's invention (*Brennan v. Dowagiac Co.*, 162 Fed. 476).

This Honorable Court by construction reduces the scope of appellee's patent to nil, not only denying to appellee any practical benefit from its patent, but inflicting great pecuniary loss upon an innocent party and in favor of a confessed wrong-doer.

Such a construction of the Brown patent as that adopted by this Court is refused by Judge Coxe, in the case of *Gaisman v. Gallert*, 105 Fed. 955, in language so persuasive and so fitted to the case at bar as to justify a special reference to it by way of summary of the foregoing argument. On page 958 he says:

“Two propositions are advanced in support of the contention that the claims are not in-

fringed. First: The claims must be construed so narrowly that no structure will infringe in which the patented device is not 'copied and reproduced in its minutest details.' (The second proposition is specific and therefore omitted here.)

"If the first of these propositions be accepted nothing but a Chinese copy will infringe.

"The proposition is somewhat startling on its face, and should be supported by exceedingly cogent reasoning. If there be a way compatible with reason and common sense to avoid a construction which declares that a patent granted by the government has no claim which protects the invention, that way should be found and followed. It is thought that neither of the defendant's propositions can be maintained. Although the complainants are not entitled to a broad construction they are entitled to a construction which covers plain and palpable imitations of their improvement, and they are also entitled to a liberal reading of the claims when they are attacked by one who is most certainly using the invention. . . . When forced to choose between a construction which destroys and one that saves the patent the court should not hesitate to adopt the latter." (Citations appended.)

The opinion of Judge Coxe, it is submitted, reflects the law, in various aspects, as applicable to

the facts presented in the case at bar, and an opinion from so eminent an authority must of itself carry weight.

Counsel for petitioner hereby certifies that in his judgment this petition is well founded and that it is not interposed for delay.

And your petitioner will ever pray.

BROWN-MEYER COMPANY,

Petitioner.

By JOSEPH L. ATKINS,

Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY, a
Corporation, and PERCY G.
ALLEN,

Appellants,

vs.

BROWN-MEYER COMPANY, a Cor-
poration,

Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

TRANSCRIPT OF RECORD.

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APR

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INDEX.

	Page.
Answer	7
Appeal, Petition for, and Order Allowing.....	62
Appeal, Bond on	63
Appeal, Citation on	99
Appendix of Documentary Evidence.....	102
Assignments of Error.....	59
Bill of Complaint.....	1
Clerk's Certificate of Record on Stipulation of Parties	101
Decree, Interlocutory, for Injunction and Accounting	17
Decree, Supplemental, on Contempt Proceedings	29
Evidence, Condensed Statement, on Trial of Case	66
Evidence, Copy of Documents Introduced on Trial	102

MOTIONS—

Plaintiff's, to Punish Defendants for Contempt	20
Affidavits in Support of Same.....	21
Answer of Defendants Thereto.....	24
Defendants', for Leave to File Supplemental Answer	46
Defendants', to Vacate Supplemental Decree	31
Affidavits in Support of Same.....	32 to 45
Exhibits in Support of Same.....	38 and 46
Opinion of Trial Judge.....	14
Order, Denying Defendants' Petition to File Supplemental Answer	58
Order, Denying Defendants' Motion to vacate Supplemental Decree	57
Stipulation of Parties that Clerk Certify Printed Record Without Comparison.....	100
Supplemental Answer as Proposed by Defendants	53

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JOSEPH L. ATKINS, 615 Chamber of Commerce Bldg.,
Portland, Ore.

*In the District Court of the United States for the
District of Oregon.*

Brown-Meyer Company, a Corporation,

Plaintiff,

vs.

Crystal Laundry Company, a Corporation, and

Percy G. Allen,

Defendants.

No. 6718.

BILL OF COMPLAINT IN EQUITY.

To the Judges of the District Court of the United States
for the District of Oregon:

Brown-Meyer Company, a corporation organized under the laws of the State of Oregon, and located and doing business in the City of Portland in said State, brings this its bill against Crystal Laundry Company, a corporation located and doing business in the City of Portland, State aforesaid, and Percy G. Allen each residents and citizens of the State of Oregon, and inhabitants of the District of Oregon, and for cause of suit plaintiff alleges as follows:

I.

That heretofore, on the 13th day of August, 1913, Charles F. Brown was the true, original and first inventor of a certain new and useful towel holder, not known or used by others in this country before his invention or discovery thereof, and not patented or de-

scribed in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application for patent therefor hereinafter recited, and not in public use or on sale in this country for more than two years prior to his application for patent therefor hereinafter recited; and that no application for a foreign patent for said invention was filed more than twelve months prior to the filing of the application for the hereinafter recited patent in this country.

II.

That the said Charles F. Brown, being as aforesaid the inventor of said improvement and being a citizen of the United States, made application to the proper department of the Government of the United States, to-wit: the Commissioner of Patents, for letters patent in accordance with the then existing acts of congress, and having complied in all respects with the conditions and requirements of said acts on the 3rd day of November, 1914, letters patent of the United States No. 1,115,895, signed, sealed and executed in due form of law for said invention or discovery were issued and delivered to the plaintiff aforesaid Brown-Meyer Company, as assignee of the said Charles F. Brown, whereby there was secured to it, its successors and assigns for the term of seventeen years from the 3rd day of November, 1914, the full and exclusive right of making, using and vending said improvement to others to be used, which said letters patent are now of record in the patent office of the United States, and which is ready here in court to be produced.

III.

That a description or specification of the aforesaid improvement was given in the schedule to the aforesaid letters patent, accompanied by said drawings referred to in such schedule and forming a part of said letters patent. The said letters patent and the said specifications thereto annexed which, or an exemplified copy of which plaintiff will produce as directed by this Court, were duly recorded in the Patent Office.

IV.

That by an instrument in writing bearing date August 7, 1913, the said Charles F. Brown duly assigned, transferred and set over unto the plaintiff, Brown- Meyer Company the entire interest in and to the said invention and letters patent for, to and in the entire United States and all of its States and territories, to be held and enjoyed by it for the life of said patent, which assignment was duly recorded on August 13, 1913, in the patent office of the United States in Liber 192, page 290 of Transfers of Patents as by said assignment with the certificate of recording thereto affixed or a duly certified copy of said assignment in court to be produced will more fully appear, and the plaintiff is now the exclusive owner of said letters patent and of the invention and improvement therein described, and claims and owns all rights secured by said letters patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

Yet the said defendants, well knowing the premises and the rights secured to your orator, as aforesaid, but contriving to injure your orator, and to deprive it of the benefits and advantages which might and otherwise would accrue unto it from said invention after the issuing of the letters patent and after the vesting of the same in your orator, as aforesaid and before the commencement of this suit, did as your orator is informed and believes, without the license or allowance and against the will of your orator, and in violation of its rights and in infringement of the aforesaid letters patent within the District of Oregon and elsewhere in the United States unlawfully and wrongfully, and in defiance of the rights of your orator, make, construct, use, and vend to others to be used, towel holders made according to and employing and containing said invention and that they still continue so to do; and that they are threatening to make the aforesaid towel holders in large quantities and to supply the market therewith and to sell the same.

All in defiance of the rights acquired by and secured to your orator, as aforesaid, and to its great and irreparable loss and injury, and by which it has been and still is being deprived of great gain and profits which they might and otherwise would have obtained, and which have been received and enjoyed, and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

And your orator further shows unto Your Honors, on information and belief, that said defendants have sold large quantities of said towel holders, and still have a large quantity on hand which they are still offering for sale, and have made and realized large profits and advantages therefrom, but to what extent and how much exactly your orator does not know, and prays a discovery thereof. And your orator says that the use of said invention by said defendants and their preparation for and avowed determination to continue the same, and their other unlawful acts as aforesaid, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patent in disregard of your orator's rights.

And your orator further shows unto Your Honors that it has caused notice to be given to said defendants of said infringements and of the rights of your orator in the premises, and requested them to desist and refrain therefrom; but they, the defendants, have disregarded said notice and refused to desist from said infringements, and still continue to make, use and sell said towel holders.

And forasmuch as your orator has no adequate relief except in this Court, to the end that the defendant may be compelled to account for and to pay over the income thus unlawfully derived from the violation of the rights of your orator as above, and be restrained from any further violation of said rights, your orator prays that Your Honors may grant a writ of injunction restraining the defendants and each of them from any

further construction, or sale or use in any manner of said patented invention or any part thereof, in violation of the rights of your orator as aforesaid, and that the towel holders now in the use of the said defendants may be destroyed, or delivered up to your orator for that purpose; and also, that Your Honors, upon the entering of a decree for infringement, as above prayed for, may proceed to assess, or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orator has sustained by reason of such infringement, and that Your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by the said defendants as herein set forth.

And your orator also prays for a provisional or preliminary injunction, and for such other relief as the equity of the case may require, and as to Your Honors may seem meet.

BROWN-MEYER CO.,

R. P. Meyer, Vice-Pres.

JOSEPH L. ATKINS,

Solicitor for Plaintiff.

Here follows verification.

*In the District Court of the United States for the
District of Oregon.*

(Title.)

ANSWER.

Come now the above named defendants, Crystal Laundry Company, a corporation, and Percy G. Allen, appearing by their attorney, T. J. Geisler, and make answer to the bill of complaint herein as follows:

I.

These defendants deny that Charles F. Brown at any time was the true, or original, or first inventor of a certain new or useful towel holder not known or used by others in this country before his invention or discovery thereof, nor patented or described in any printed publication in this, or any foreign country before his invention or discovery thereof.

II.

That these defendants deny any knowledge or information sufficient to form a belief as to whether said Charles F. Brown at any time made an application for Letters Patent of the United States. They admit that letters patent of the United States, bearing date the 3d day of November, 1914, numbered 1,115,895 were issued to the plaintiff herein, as alleged assignee and successor of said Charles F. Brown, but that said letters patent refer merely to certain specific, limited and narrow improvements in towel holders, as hereinafter more fully set forth.

III.

These defendants deny any knowledge or information sufficient to form a belief as to whether or not said Charles F. Brown ever assigned, transferred, or set over unto the plaintiff the entire, or any interest in said alleged invention, or the letters patent therefor in or to the United States, or any of its States or Territories, or as to whether the plaintiff now is the exclusive owner of, or has any interest in said letters patent, or the invention or improvement therein described.

IV.

These defendants further deny that they, well knowing of any rights vested in the plaintiff or in its said alleged assignor, Charles F. Brown, or for the purpose of contriving to injure either of them, or to deprive either of them of any benefits or advantages which otherwise might or could accrue unto them, or either of them from any invention of the said Charles F. Brown, or after the issuing of any letters patent to plaintiff, or before the commencement of this suit, without license or allowance, or against the will of plaintiff, or in violation of its rights under said letters patent within the District of Oregon or elsewhere in the United States unlawfully, or wrongfully, or in defiance of the rights of the plaintiff or otherwise did make, construct or use, or vend to others, towel holders made according to, or employing or containing said alleged invention, or that they are at present so doing. Or that they are threatening to make towel holders embodying said alleged invention, or to supply the market therewith, or to sell the same.

These defendants further deny that they did anything in the premises at any time in defiance of any rights acquired or secured by plaintiff, or to its loss or injury, or by which the plaintiff has been or is being deprived of any gain or profit which plaintiff might, or otherwise would have obtained.

These defendants further deny that they have sold large quantities of towel holders embodying said alleged improvement, or that they have a large quantity of such towel holders on hand which they are offering for sale, or that they made or realized any profits or advantages therefrom, except that defendants admit that they did, for a limited time, use towel holders embodying the invention set forth in said alleged letters patent, such use being under the circumstances and conditions as hereinafter set forth, and not otherwise.

And these defendants further deny that they have, or are still making or using, or selling towel holders embodying the improvements set forth in said alleged letters patent, or ever made or used the same, except as hereinafter specifically stated.

And these defendants for a further and separate defense herein allege:

That the alleged invention of said Charles F. Brown related to towel holders designed for supplying individual towels to users, and that this was a well and highly developed art before said Brown entered into the field with his said alleged improvement, as is shown by the following patents:

Letters Patent of U. S.

issued to:

	Number	Date
N. S. Baldwin and		
E. S. Goodwin	557,754	Apr. 7, 1896
J. G. Cooner	908,076	Dec. 29, 1908
J. Rouso	42,398 Design	Apr. 9, 1912
L. Straub	1,038,984	Sept. 17, 1912
T. K. Taylor	1,052,292	Feb. 4, 1913
G. Reid	1,067,622	Jul. 15, 1913
T. Heins and E. R.		
Galland	1,078,501	Nov. 11, 1913

That therefore, the alleged improvement of said Brown, if it did constitute an invention, was of a very specific and limited character, and must be construed accordingly in order not to encroach upon the rights which were vested in the general public prior to and at the time said Brown entered said field.

That when said application for letters patent referred to by plaintiff in its bill of complaint came up for examination before the Commissioner of Patents of the United States, the latter rejected said application because of the alleged invention therein described and claimed as lacking patentable novelty, and cited against the same the above specified letters patents, and that thereupon said Brown amended his said application so as to distinguish his alleged invention from and disclaim the prior state of the art as described by said patents; and likewise then waived, abandoned and cancelled the broader claims theretofore made by him in his said ap-

plication and restricted himself to the specific claims now appearing in said letters patent.

That the defendant, Crystal Laundry Company, admits that it made and used a few towel holders embodying the features set forth in said claims of said alleged letters patent, but such making occurred some time before said letters patent were issued, and before the defendant Crystal Laundry Company had any knowledge of said Brown's alleged invention, or that said letters patent were to be issued therefor; and immediately after the defendant Crystal Laundry Company was informed of said letters patent, it notified the plaintiff that it would discontinue the use of towel holders embodying any features covered by said letters patent, and did thereupon proceed immediately to change over its said towel holders, so that same would and did not infringe upon said letters patent. That said defendant Crystal Laundry Company used its said towel holders during the period from November 3d to about November 30, 1914. That the towel holders so used were used by said defendant Crystal Laundry Company in supplying customers of theirs with whom it had been dealing for a long time prior to said November 3d, 1914. That such customers did not desire to be supplied with towel holders embodying plaintiff's alleged improvement, but merely desired any device which the defendant Crystal Laundry Company would supply for that purpose. That the business of supplying laundry towels in connection with towel holders is one of considerable expense and sharp competition, and that defendants made no profit in using said towel holders during said period

between November 3d and November 30, 1914, and that the plaintiff suffered no loss or damage by defendants' acts whatsoever. Nevertheless, for the purpose of amicably adjusting the matter with the plaintiff, the defendant Crystal Laundry Company, prior to the commencement of this suit, offered to pay to the plaintiff the sum of Fifty (\$50) Dollars, and promised not to use the improvement covered by said alleged letters patent, and did faithfully live up to such promise, for it did not use any towel holders embodying said improvement since about said 30th day of November, 1914; but the plaintiff declined said offer, and refused to accept any other sum in settlement of its alleged damages whatever, except the sum of Three Hundred (\$300) Dollars, which demand was exorbitant and wholly without equity, and therefore this defendant refused to pay the same.

And the defendant Crystal Laundry Company further alleged that the plaintiff is wrongfully trying to drive this defendant out of the business of supplying towels in connection with a fixture of any kind, notwithstanding the plaintiff well knows that the defendant, ever since said 30th day of November, 1914, has been, and is still using only such device as is open to use by the general public.

That the plaintiff, notwithstanding the premises, has threatened, and instead of confining itself to this suit and await the termination thereof, is threatening to bring other suits against the various customers of this defendant, pretending that the towel holder which the defend-

ant uses is an infringement upon said alleged letters patent, although well knowing that such is not the case as aforesaid; and if plaintiff be permitted to proceed in such threatened conduct this defendant will be greatly and irreparably injured, and its rights in the premises cannot be protected save by a restraining order of this Court against the plaintiff during the pendency of this suit.

WHEREFORE, the defendants pray that the bill of complaint herein be dismissed, and that they have their costs and disbursements wrongfully incurred herein; and that the defendant Crystal Laundry Company also have such other and further relief in the premises against the plaintiff as to the Court may seem just and in accordance with equity.

CRYSTAL LAUNDRY COMPANY,

By Percy G. Allen,
President.

Percy G. Allen.

T. J. Geisler,
Solicitor for Defendants.

Here follows verification.

*In the District Court of the United States for the
District of Oregon.*

Brown-Meyer Company, a Corporation,

(Title.)

OPINION OF TRIAL JUDGE.

Jos. L. Atkins for Plaintiff.

T. J. Geisler for Defendants.

Wolverton, District Judge:

The complainant is the owner of certain letters patent No. 1,115,895, issued to Charles F. Brown, November 3, 1914. It is only necessary to recite Claim 2, which is as follows:

“In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together.”

The supporting member consists of a shelf for holding folded towels, the towels being provided with gromets in the corner. The assembling member consists of a standard, curved at the upper end, passing at its lower end through the shelf. To the assembling member is attached a flexible retaining member, commonly a chain, one end being fixedly attached at the top or curved end

of the assembling member, and the other end detachably secured to the lower end of the assembling member beneath the shelf, by use of an ordinary padlock. In use, a towel is taken from the shelf, slipped over the curve of the standard or assembling member, and applied and then dropped, but is retained by the sag of the retaining member. The drawings show the sag to extend into a basket which serves as a depository of the soiled towels until removed.

The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance.

Complainant sues, alleging infringement, and seeks an injunction and damages.

The primary question with which we have to deal is, does the defendants' device infringe plaintiff's patent?

The claims of the complainant's patent, it must be conceded, are subject to narrow construction, but so construed, I am convinced that the defendants are infringing.

It is the rule that to sustain the charge of infringement, the infringing device must be substantially identical with the one alleged to be infringed in the following particulars: First, in result attained; second, the means of attaining that result; and third, the manner in which the different parts operate and co-operate to produce the

result. If the devices are substantially different in either of these respects, the charge of infringement is not sustained. *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed. 916, 923.

But it has also been determined that if the defendant uses the plaintiff's patented invention, he infringes, whatever else he may use or whatever else he may have added to it. *Johnson v. Root*, Fed. Cases 7411.

So it is that an infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. *Carter v. Baker*, Fed. Cases 2472; *May v. County of Fond du Lac*, 27 Fed. 691.

Nor is infringement avoided because some colorable variation or expedient merely impairs or narrows the function and usefulness of the patented device. *Whitely v. Fadner*, 73 Fed. 486.

Now, applying these principles, I am not persuaded that the simple means of attaching the chain or retaining member to the bottom of the basket on the inside instead of at the foot of the assembling member, varies the device to such an extent as to add a new discovery, or even an old element, to the combination. The complainant's device is so constructed that the basket may be used in connection with it as a depository for the soiled towels. The defendants' device simply makes the basket a depository and merely changes the place of attachment for the lower end of the chain or retaining member. As an illustration, in the *Reid* patent, the lower end of the chain is attached to a wall, and yet the patent to com-

plainant's assignor was granted notwithstanding the prior patent of Reid. Now suppose that the defendant had used the Reid patent and simply detached the chain from the wall and attached it to the bottom of the basket and used the basket as a depository for the towels, could any one say that such a change constituted an added discovery or new element to the Reid patent? The Reid retaining member could have been used by elongating the chain so as to drop the sag into a basket and thereby bring the basket into play as a depository as the complainant uses a basket.

Thus I cannot conceive that the detachment from the lower end of the assembling member in the Brown patent and attaching it to the bottom of the basket or depository is the adding of a new element or discovery to the defendants' device, and am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement.

The matter of treble recovery will be left for consideration on the accounting.

*In the District Court of the United States for the
District of Oregon.*

No. 6718

(Title)

**DECREE FOR INJUNCTION AND
ACCOUNTING.**

Entered January 31, 1916.

At the November term of the District Court of the United States for the District of Oregon, held at the

United States Court Room, in the City of Portland, on the first day of December, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

Present: The Honorable Charles E. Wolverton, District Judge.

This cause coming on to be heard at the November Term of the said Court, in the year of our Lord, One Thousand Nine Hundred and Fifteen, and was argued by counsel; and thereupon, upon consideration thereof, it was **ORDERED, ADJUDGED and DECREED** as follows:

FIRST. That said Letters Patent No. 1,115,895, granted and issued on the 3rd day of November, 1914 to Brown-Meyer Company, assignee of Charles F. Brown, being the Letters Patent referred to in the Bill of Complaint herein, are good and valid as respects all the claims thereof.

SECOND. That the said Charles F. Brown was the first true and original inventor of the invention and improvement as described in the claims in said Letters Patent, and the specification annexed thereto.

THIRD. That Brown-Meyer Company, the complainant in said Bill, is the lawful owner of said Letters Patent.

FOURTH. That the defendants, Crystal Laundry Company and Percy G. Allen, have infringed upon the claims of said Letters Patent, and upon the exclusive rights of the complainant under the same.

FIFTH. That the complainant do recover of the

defendants the profits, gains and advantages which the said defendants have derived, received or made by reason of said Letters Patent, and that the complainant do recover all damages resulting from said infringement.

SIXTH. And it is hereby further **ORDERED, ADJUDGED and DECREED** that it be referred to Wallace McCammant, Master in Chancery of this Court, his experience in such matters being found by the Court a sufficient reason for his designation, to ascertain and take, and state, and report to the Court an account of the gains, profits and advantages which said defendants have received, or which have arisen, or accrued to them, or either of them from the said exclusive rights of the said complainant, by the use of the said invention, and the damages which the complainant has suffered by said infringement, and to assess such damages, and to report thereon with all convenient speed; and the directors of the defendant corporation, officers, attorneys, clerks, servants and workmen are ordered, directed and required to attend before said Master from time to time as required, and to produce before him such books, papers, vouchers and documents, and to submit to such oral examination as the Master may require or direct.

SEVENTH. It is further **ORDERED, ADJUDGED AND DECREED** that a perpetual injunction issue out of and under the seal of this Court, directed to the said defendants, to-wit: Crystal Laundry Company and Percy G. Allen, their associates, directors, officers, attorneys, clerks, agents, servants and workmen, enjoining and restraining them, and each of them from directly or indirectly making or causing to be made,

using or causing to be used, or vending to others to be used, in any manner, any articles, devices, apparatus or machines, containing, embodying, or employing the said invention described in the claims of said Letters Patent, pursuant to the prayer of the said Bill of Complaint, or from infringing upon, or violating the said Letters Patent in any way whatsoever.

EIGHTH. That the complainant do recover of the defendants, its costs and disbursements in this suit to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the Master's report.

CHAS. E. WOLVERTON,
Judge.

Here follows order appointing John B. Cleland Esq. Special Master to take the accounting herein.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.
(Title)

MOTION TO PUNISH DEFENDANTS FOR CONTEMPT.

Now comes the plaintiff and moves the Court for a rule upon the defendants to show cause why they and each of them should not be attached for contempt for violation of the injunction heretofore granted in this cause, and for reason says, that on or about the 2nd day of February, 1916, a decree was rendered herein, finding the letters patent sued on good and valid, the property of plaintiff, and infringed by defendants in the manufacture, use and sale of certain devices known and designated as Towel Holders, and awarding an injunc-

tion against said defendants, their clerks, agents, servants, and workmen, which decree is still in full force and effect; that on or about the 28th day of February, 1916, a writ of injunction was issued in accordance with the said decree, enjoining said defendants, their clerks, agents, servants and workmen from the manufacture, use and sale of the said infringing devices, which writ of injunction was duly served upon the defendants on or before the 28th day of February, 1916 and is still in full force and effect; but since the service of said injunction defendants and their agents have continued extensively to use devices known and designated as towel holders, embodying the invention, the manufacture, use and sale of which was enjoined as aforesaid, part of said devices being identical in construction with the towel holder adjudged to be an infringement of the patent sued on, and part being of a form modified in certain immaterial details from that identical construction, and which appears to be nevertheless clearly covered by the terms of the patent sued on as determined in the decree aforesaid, to the great and irreparable damage and injury of the plaintiff.

BROWN-MEYER COMPANY,

Plaintiff,

By **R. P. Meyer.**

JOSEPH L. ATKINS,

Counsel for Plaintiff.

STATE OF OREGON,

County of Multnomah,—ss.

AFFIDAVITS.

Before me the undersigned, Notary Public, in and for the State and County aforesaid, personally appeared

this 14th day of March, A. D. 1916, R. P. Meyer, who being first duly sworn, deposes and says that he is an officer of Brown-Meyer Co., a corporation, plaintiff in the suit in Equity No. 6718, now pending in the District Court of the United States for the District of Oregon, against Crystal Laundry Co., a corporation and Percy G. Allen, defendants, and is fully cognizant of the terms of the decree rendered therein, and of the injunction issued thereupon against said defendants; that since the 28th day of February, 1916, when said injunction was served upon said defendants and as late as the 11th day of March, there were to his personal knowledge in use in the department store of the Meier & Frank Co., in the City of Portland, Oregon, divers devices or towel holders part thereof being identical in construction with the towel holders adjudged to be an infringement of the patent sued on in the suit above referred to, and part being of a form modified in certain details which he is advised and believes to be immaterial and to be covered nevertheless by the terms of the patent sued on in said suit; that the said towel holders are, as affiant is informed and believes furnished to the Meier & Frank Co., and are supplied with towels by the Crystal Laundry Co., and Percy G. Allen, defendants as aforesaid.

R. P. MEYER.

Affiant swears that the foregoing statements so far as they come within his personal knowledge as above set forth are true and correct and that in other respects they are true to the best of his knowledge, information and belief.

Witness my hand and official seal, this 14th day of March, 1916.

HOWARD O. ROGERS,
Notary Public for Oregon.

(SEAL)

STATE OF OREGON,
County of Multnomah,—ss.

Before me the undersigned, Notary Public, in and for the State and County aforesaid, personally appeared this 14th day of March, A. D. 1916, George T. Brown, who being first duly sworn, deposes and says that he is an officer of Brown-Meyer Co., a corporation, plaintiff in the suit in Equity No. 6718, now pending in the District Court of the United States for the District of Oregon, against Crystal Laundry Co., a corporation and Percy G. Allen, defendants, and is fully cognizant of the terms of the decree rendered therein, and of the injunction issued thereupon against said defendants; that since the 28th day of February, 1916, when said injunction was served upon said defendants and as late as the 11th day of March, there were to his personal knowledge in use in the department store of the Meier & Frank Co., in the City of Portland, Oregon, divers devices or towel holders, part thereof being identical in construction with the towel holders adjudged to be an infringement of the patent sued on in the suit above referred to and part being of a form modified in certain details which he is advised and believes to be immaterial and to be covered nevertheless by the terms of the patent sued on in said suit; that the said towel holders are,

as affiant is informed and believes furnished to the Meier & Frank Co., and are supplied with towels by the Crystal Laundry Co., and Percy G. Allen, defendants as aforesaid.

GEORGE T. BROWN.

Affiant swears that the foregoing statements, so far as they come within his personal knowledge as above set forth are true and correct, and that in other respects they are true to the best of his knowledge, information, and belief.

Witness my hand and official seal, this 14th day of March, 1916.

HOWARD O. ROGERS,
Notary Public for Oregon.

(SEAL)

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

**DEFENDANTS' ANSWER ON CONTEMPT
PROCEEDING.**

U. S. of America,
District of Oregon,—ss.

The above named defendants, and each of them, answering the affidavits of R. P. Meyer and George T. Brown, verified respectively March 14, 1916, and attached to the motion of complainants for a rule requiring defendants to show cause why they should not be punished for the alleged violation of the injunction granted herein, say:

They deny that they in anywise disobeyed the injunction referred, but to the contrary have faithfully complied therewith, and intended so to do.

They admit that a single towel rack, of the kind held by the court to be an infringement of the patent in suit, was inadvertently left by defendants in the hands of Meier & Frank Company. This occurred in the following manner:

Over a year ago there was in the employ of defendants' corporation one who solicited for them. That said solicitor procured the installation of said towel rack in the women's lavatory of the 7th floor of the Meier & Frank Building. That said solicitor left the employ of defendants' corporation shortly after and went east, and still is in the east. That later the Meier & Frank Company remodeled all their lavatories, and all of defendants corporation's towel racks were taken out during such remodeling, from time to time, and later replaced. That such work of replacing was left to John A. Clancy, whose affidavit is hereto attached. That as shown by such affidavit the single towel rack in question was inadvertently not removed from the Meier & Frank Company's Building, and afterwards reinstalled in the women's lavatory on the 7th floor, but the defendants corporation had no actual knowledge of such re-installment. That defendants corporation's employees very seldom see any of its towel racks. That its drivers merely deliver the required number of towels at the Meier & Frank Company's building, and the janitor, or other employee of the latter, then places the towels on the

racks belonging to defendants corporation, and also gathers together the used towels and hands them back to the drivers.

That before said injunction was issued, I, Percy G. Allen, the manager of defendants' corporation, gave said John A. Clancy positive instructions to forthwith remove all towel racks held by this court to infringe plaintiff's patent, and he later assured me that he had complied with my instructions, and I am firmly convinced that he honestly believed that he had done so, and merely inadvertently overlooked said single towel rack.

That there are no other towel racks used by defendants' corporation which resemble the towel rack held to be an infringement. That defendants have offered plaintiff unqualified opportunity to inspect all their towel racks, and have informed complainant of the location thereof. That defendants have endeavored faithfully to respect the order of this court in the premises, and will at all times continue so to do.

That complainant did not call the existence of said single towel rack to the attention of defendants, otherwise than by said contempt proceedings, notwithstanding that complainant and defendants were in daily conference for some time past in making up a statement for the use of the Master in the accounting proceedings. That immediately upon having said single rack called to defendants' attention, the same was instantly removed. That furthermore, in the accounting proceedings it was agreed between complainant and defendants that all

towel racks now in use by defendants, other than roller towels, should be tabulated, so that all questions which concern the premises can be submitted to the Master. That complainant has stated to defendants that they will base the recovery which they claim to be entitled to on the number of used towels and not on the number of racks in use, and defendants have given complainant a full and true statement of the number of towels.

Therefore, complainant has not suffered any loss by said inadvertent use of said overlooked towel rack, but have a full account, and will have full recovery on all towels in accordance with what may be the final determinations of the court in the premises.

PERCY T. ALLEN.

Subscribed and sworn to before me this 18th day of March, 1916.

WM. C. SCHMITT,
Notary Public for Oregon.

L. S. My commission expires Sept. 8, 1916.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

AFFIDAVIT OF JOHN A. CLANCY.

United States of America,
District of Oregon,—ss.

I, John A. Clancy, being duly sworn say; that I reside in the City of Portland, in the above named dis-

trict, and have been, and still am, the Route Manager in charge of the towel supply department of the above named defendants, Crystal Laundry Company. That I have read the annexed answer of the defendants, verified March 18th, 1916, and know the contents thereof. That the single towel rack of the kind held by this court to be an infringement of the patent in suit, was inadvertently left by me in the hands of the Meier & Frank Company, as in said answer stated. That during the time said Meier & Frank Company remodeled their building in said City of Portland, the towel racks supplied by defendants' corporation were from time to time taken out of the places where installed. That all towel racks so removed were turned over to me and later replaced, but I did not keep any record of such towel racks. That I was firmly of the belief that all towel racks used by the Meier & Frank Company in their building prior to the remodeling thereof, had been turned in to me, and therefore, also believed that I had a complete record of all the towel racks used by said Meier & Frank building. That I did not know, until my attention was specifically called thereto, by Mr. Allen, Manager of the defendant corporation, after he had read the affidavits in the contempt proceedings referred to in defendants said answer, that said single forbidden towel rack was still in use in the women's lavatory on the 7th floor of the said Meier & Frank building; and Mr. Allen immediately gave me instruction to remove said towel rack, and with such instructions I forthwith complied by removing said towel rack.

J. A. CLANCY.

Subscribed and sworn to before me this 18th day of March, 1916.

WM. C. SCHMITT,
Notary Public for Oregon.

L. S. My commission expires Sept. 8, 1916.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

SUPPLEMENTAL DECREE.

This 21st day of March, A. D. 1916, this cause coming on to be heard before the Honorable Charles E. Wolverton, District Judge, on certain affidavits filed herein charging defendants with contempt for violation of the injunction heretofore granted in this cause, both parties being represented by counsel present. And the Court having heard argument of counsel for both parties and having considered said affidavits, and also the modified device admitted by the defendants to have been used by them and complained of by plaintiff as constituting a continuing infringement since the decree made in this cause of the patent in suit, said device comprising a shelf, a wire towel retaining member, snap hooks secured to opposite ends of said member and adapted to secure said member to the shelf, and a staff or supporter on the shelf for supporting a portion of said member above the shelf,

NOW THEREFORE, upon consideration thereof it is ORDERED, ADJUDGED AND DECREED as follows:

FIRST. That the aforesaid modified device infringes upon the patent in suit, to-wit: United States Letters Patent No. 1,115,895, granted and issued on the 3rd day of November, 1914 to Brown-Meyer Company, assignee of Charles F. Brown.

SECOND. That the defendant, Crystal Laundry Company and Percy G. Allen, in the use, manufacture or sale of said modified device, have infringed and do infringe upon the claims of said Letters Patent, and upon the exclusive rights of the complainant under the same.

THIRD. That the Special Master in this cause, John B. Cleland, shall take into consideration said modified device and report thereon to the Court in accordance with the instructions and under the authority of his original appointment to act as Special Master in this cause.

FOURTH. That the manufacture, use, and sale, manufacture, use or sale of said modified device constitutes a violation of the injunction heretofore granted and issued in this cause.

FIFTH. That in respect to said violation of the injunction and in respect also to the violation thereof complained of in the use of one of the identical devices covered by the original decree, the Court condones the offense upon present showing made to the satisfaction of the Court that the said use in a single instance of the

said identical device covered by the original decree was made unintentionally, and that in all other respects the order of the Court will be strictly and fully, without any delay, complied with.

CHAS. E. WOLVERTON,
Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

MOTION TO VACATE SUPPLEMENTAL
DECREE OF MARCH 21, 1916.

And now comes the above named defendants and move the Court, on the annexed petition of the above named defendants, verified March 31, 1916, and other papers and exhibits therein referred to, to vacate the supplemental decree entered in this cause on the 21st day of March, 1916, and that thereupon the parties to this suit be required to submit to the Court, or to the Master by the Court appointed, as the Court may deem expedient, all proofs which they may have concerning the particular wire towel rack referred to in said supplemental decree, and with regard to its bearing upon the alleged improvement in towel racks claimed to be covered by the complainant's patent in suit, in order that the Court may thereupon take such further proceedings in this cause as to it may seem meet; and that the defend-

ants have such further and other relief in the premises as may be just.

Dated April 4, 1916.

T. J. GEISLER,
Attorney for Defendants.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

AFFIDAVIT OF PERCY G. ALLEN.

United States of America,
District of Oregon,—ss.

I, Percy G. Allen, being duly sworn, say that I reside in the City of Portland, State of Oregon, that I am the president of the above named defendant, Crystal Laundry Co., and also one of the defendants, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the contempt proceedings then being heard before the Hon. Charles E. Wolverton, United States District Judge, on the representations presented to said Judge by the complainants in this suit; and that in such proceedings a certain wire towel rack, of which a photograph is hereto annexed and marked "Exhibit A" and referred to as a part of this affidavit, was presented by complainant's counsel, Joseph L. Atkins, to the Court as being an infringement of the towel rack described in the patent in suit, and the claims of the latter; and that in the course of such proceeding said complainant's counsel did point

to and state to the court that the construction of the towel rack shown in said Exhibit A was the equivalent of the towel rack described in the patent in suit; that the shelf A' of Exhibit A was the equivalent of the shelf or supporting member of the Brown device covered by the patent in suit; that the post B with its forked end B' was the equivalent of the towel assembling member of the patent in suit; and that the wire C was the equivalent of the flexible retaining member of the patent in suit; and that the means by which the top end of the wire C was secured to the shelf A' was also adapted to having the lower end of the wire C secured thereon, and thus provide means which were equivalent to the means specified in said Brown patent for securing both ends of the flexible retaining member therein shown in connection with the assembling member. And I also heard the complainant's counsel state as the reason why he considered the wire towel rack shown by said Exhibit A to be an infringement of the patent in suit was that the lower end of the wire C could be removed from its point of attachment at the base of the case A and fastened to the same means to which the upper end of the wire is secured in said wire towel rack.

That I am informed, by an examination of the application for patent made by one Henry A. Ammann, whose application is still pending in the United States Patent Office, under Serial No. 864,059, having been filed September 29, 1914, that the said Ammann invented his towel rack prior to June 15, 1913, and at that time did disclose to others his said invention, and built a full-sized towel rack embodying said invention,

and that such towel rack was operated in the presence of others, and operated successfully. That the said Henry A. Ammann resides at Spokane, Washington, and I have requested him to make an affidavit of said facts himself, that I expect to receive such affidavit within a few days and when obtained will be served and filed in connection with this, my own, affidavit in the premises.

That the wire towel rack so invented by said Henry A. Ammann, and described and shown in his said application for letters patent, is substantially of the same construction, and also operates in the same manner as the towel rack presented in Court, as aforesaid, and shown by said photo Exhibit A hereto attached.

PERCY G. ALLEN.

Subscribed and sworn to before me this 5th day of April, 1916.

L. S.

WM. C. SCHMITT,
Notary Public for Oregon.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

United States of America,
District of Oregon,—ss.

I, John A. Clancy, being first duly sworn, depose and say that I reside in the City of Portland, State of Oregon, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the time of the hearing of the contempt proceeding referred to in the annexed affidavit of Percy

G. Allen, and at said time there was presented before the Hon. Charles E. Wolverton, United States District Judge, who heard said contempt proceeding, a wire towel rack which was later photographed and is represented by the photograph Exhibit A hereto attached; and that I also heard the complainant's counsel, Mr. Joseph L. Atkins, state before the Court that he considered said wire towel rack an infringement upon the patent granted to Charles F. Brown, November 3, 1914, being the patent involved in this suit; and I heard the said complainant's counsel compare said wire towel rack with the towel rack described in the patent in suit, and in such description heard said complainant's counsel describe the shelf marked A' in Exhibit A, showing said wire towel rack as being the equivalent of the shelf in the device described in the patent in suit; the forked post B' to be the equivalent of the towel assembling member of the patent in suit; the flexible wire C to be the equivalent of the flexible retaining member of the patent in suit; and the means for fastening the upper end of said wire C to the bottom of the shelf A' being the equivalent of the means provided for securing the bottom end of the flexible member in the patent in suit.

J. A. CLANCY.

Subscribed and sworn to before me this 3rd day of April, 1916.

L. S.

WM. C. SCHMITT,
Notary Public for Oregon.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

AFFIDAVIT OF AMOS BURG.

United States of America,
District of Oregon,—ss.

I, Amos Burg, being first duly sworn, say that I reside in the City of Portland, State of Oregon, that I have read the foregoing affidavits of John A. Clancy and Percy G. Allen, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the time of the hearing of the contempt proceeding before the Hon. Charles E. Wolverton, United States District Judge; that I was also present in Court on said day and heard counsel for complainants describe said wire towel rack shown in the accompanying Exhibit A, and that the statements made in said annexed affidavits of John A. Clancy and Percy G. Allen, with respect to what was said by complainant's counsel at that time, with regard to the construction and operation of the wire towel rack shown by said Exhibit A, and its bearing on the device shown in the patent in suit, are in all respects correct as I know of my own knowledge, by reason of being present on said occasion.

AMOS BURG.

Subscribed and sworn to before me this 5th day of
April, 1916.

L. S.

WM. C. SCHMITT,
Notary Public for Oregon.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

AFFIDAVIT OF WM. C. SCHMITT.

United States of America,
District of Oregon,—ss.

I, William C. Schmitt, being first duly sworn, say that I am a graduate engineer, having given special attention to patent matters for some years past, and am duly admitted to practice before the United States Patent Office. That I am conversant with the reading of the patent drawings and specifications. That I have read what I believe to be a copy of the specification and seen a blue print of drawings constituting a part of the application for patent filed by Henry A. Ammann for an improvement for Towel Racks, September 29, 1914, in the United States Patent Office under Serial No. 864,059. That I have also seen the device described in the annexed petition of the above named defendants to be the towel rack shown by Exhibit A hereto attached, and in said petition referred to; that said photograph, Exhibit A, is a photograph of said towel rack, and that said towel rack is the identical device described and shown by said drawings and specification in said application of Ammann.

That said "Exhibit A" consists of an upright case A, open at the upper part at the front, in which open part is a shelf A', on which is mounted a post B having a forked upper end B'. A wire C has its upper end led through the shelf A' and is fastened on the under

side of the latter to a sort of snap hook, and the lower end of the wire C is fastened to a sort of snap hook provided in the bottom of the portion D. The towels are strung on the wire C, and in use are brought over the fork and dropped in the receptacle C, as illustrated in the photograph.

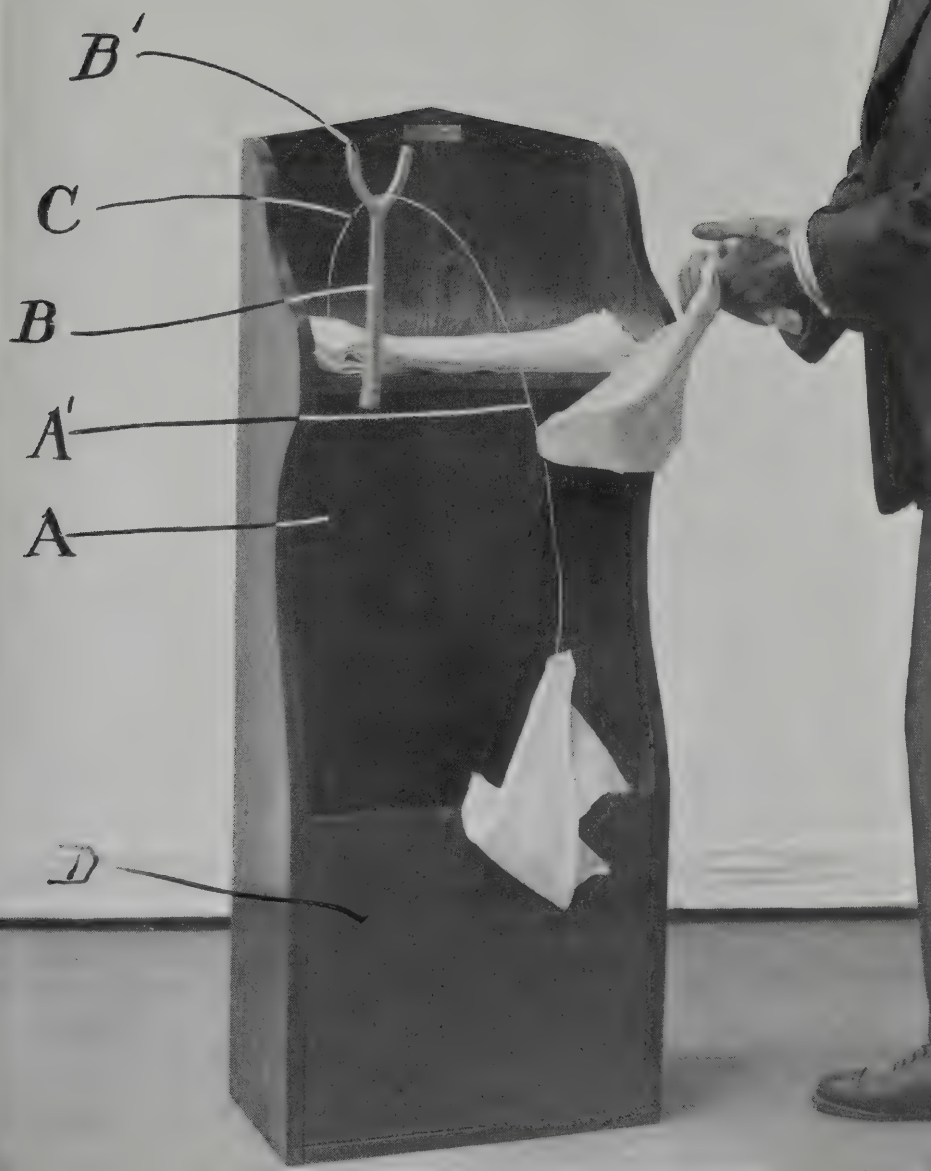
That the device shown by Exhibit A is substantially in accordance, both in construction and in operation, with the device disclosed by said application for patent of Henry A. Ammann. That included in the copy of the latter's application shown to me is an affidavit on behalf of said Henry A. Ammann, giving a description of a device which he, said Ammann, invented prior to June 15, 1913; and that the description of the device given in said affidavit tallies, in respect to construction and operation, substantially with the description of the invention contained in said application for patent of said Henry A. Ammann, and also with the construction and operation of said Exhibit A.

WM. C. SCHMITT.

Subscribed and sworn to before me this 5th day of April, 1916.

G. S. GILLESPIE,
Notary Public for Oregon.

L. S. My commission expires April 7, 1917.



*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

AFFIDAVIT OF VIVIAN FLEXNER.

State of Oregon,

County of Multnomah,—ss.

I, Vivian Flexner, being duly sworn, depose and say that I reside in the City of Portland, State of Oregon; that I am the duly appointed stenographer who is taking the testimony before the Master on the accounting in the above entitled suit, and that on the 30th day of March, 1916, in the hearing before the Master, the following matters were stated by the counsel for the respective parties in my presence:

“MR. GEISLER: The plaintiff’s counsel admits that he did contend before the Court on the hearing at which the supplemental decree was entered, that the device marked Complainant’s Exhibit EE, is an infringement of the patent in suit.

“MR. ATKINS: Complainant’s counsel adds that the Court considered that, passed upon it and signed the supplemental decree to that effect.”

I do further state that I have examined the photograph hereto attached as Exhibit A, and that such photograph shows the device which was referred to in said statements as Exhibits EE.

(Sd.) Vivian Flexner.

Subscribed and sworn to before me this 4th day of April, 1916.

L. S.

(Sd) Glenn E. Husted,
Notary Public for Oregon.

My commission expires Jan. 4, 1920.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

To Joseph L. Atkins, Esq., Attorney for Complainant:

Please take notice that the annexed affidavits of Henry A. Ammann, John Frank Clinton and George W. Blood, verified the 8th day of April, 1916, will be filed and used as part of the moving papers in the Motion in the above entitled suit for vacating the supplemental decree therein entered the 21st day of March, 1916.

Dated, April 10, 1916.

T. J. GEISLER,

Attorney for Defendants.

Due service of the above notice and copies of the affidavits referred to therein is hereby admitted this 10th day of April, 1916.

JOSEPH L. ATKINS,

Attorney for Complainant.

*In the United States District Court for the
District of Oregon.*

No. 6718.

(Title.)

AFFIDAVIT OF HENRY A. AMMANN.

State of Washington,
County of Spokane—ss.

Henry A. Ammann, being first duly sworn, doth depose and say, that he is the applicant of finally allowed United States application for patent for improvement in towel racks, filed in the Patent Office, at Washing-

ton, D. C., on the 29th day of September, 1914, bearing serial No. 864,059.

Affiant avers that the aforementioned record in the Patent Office shows that the patent to C. F. Brown, No. 1,115,895, issued November 3d, 1914, and having an application filing date of August 13th, 1913, was cited as an anticipatory reference against certain claims of the aforementioned patent application.

That prior to June 15th, 1913, applicant conceived the idea of stringing towels on a flexible line or wire with the towels supported on a shelf and one end of the wire anchored to the shelf and the other end of the wire anchored to the floor, and affiant conceived the idea of a fork-like but entirely open guide for engaging an intermediate portion of the flexible line or wire, and that prior to June 15th, 1913, applicant himself constructed an actual full size device fully embodying his conception. The said device was constructed in affiant's barn at 715 East Front Avenue, Spokane, Washington, as he did not desire to disclose the invention to anyone excepting the foreman of his laundry and his bookkeeper, whose names are, respectively, George W. Blood and John Frank Clinton. That when the device was completed it was in all respects according to the attached photograph marked Exhibit A; that in said device, the fork or open guide consisted of an upright board A, nailed to a shelf B, and that the shelf B was fixed to a board C, anchored to the wall in the office as indicated by nails D. In forming the fork, the latter was notched at E to form a guide for the flexible wire F. One end

of the flexible wire F extended through a stack of towels G, and through the support B where it was anchored at H. The wire extended downwardly and was anchored to the floor at I.

Affiant avers that the attached photograph is not a photograph of the original device, but is a photograph of a device built in all respects similar to the original device. Although diligent efforts have been made to locate the original device, it has been found impossible to do so by reason of the fact that shortly after the original device was constructed, affiant moved his toilet supply business from the old plant at 715 East Front Avenue, Spokane, Washington, to the new plant at 629-31 Erie Street, Spokane, Washington.

The original device, precisely in accordance with the attached photograph, was set up by affiant at his old laundry, prior to June 15th, 1913, and that the said Blood and Clinton were present at the time, and said device was carefully and exhaustively operated and examined to determine whether or not the towels would remain in stacked order on the shelf in view of the pulls and jerks on the wire incident to the operation of wiping the hands or face, and affiant and each of said parties advanced the towels singly along the wire and over and through the fork guide to determine whether or not the plan and device were feasible. The said Blood and Clinton, and affiant, further examined the towels to determine whether or not the yield of the wire would be sufficient to prevent the formation of enlarged holes in the towels as the same were drawn along the wire

and used for wiping purposes, and it was found that the device worked highly successfully.

The circumstances which caused affiant, and the said Blood and Clinton, to clearly recall the date of first making and using this device, were as follows: Affiant is secretary and treasurer of the Spokane Toilet Supply Company, of Spokane, Washington, and the said company constructed a new plant at 629-31 Erie Street, Spokane, Washington, the building of which was started June 1st, 1913, and affiant was so completely occupied in attending to the construction of this new plant that he was unable to give his attention to the further operation of said invention until after the plant was completed on January 10th, 1914.

Immediately after the business of said company was successfully installed in said new plant on or about the last of January, 1914, affiant engaged a carpenter to construct the actual device shown in the attached photograph in order to show the same to the remaining owner of the company who is permanently located at Seattle, Washington, and who did not see the original device. The device now shown in the photograph is still in the possession of affiant.

Affiant avers that he has telegraphed to the United States Patent Office an order for a certified copy of his afore-named application and that the money has been deposited therefor in the United States Government Depository at the Old National Bank, Spokane, Washington, and that the afore-named averments constitute all that is pertinent for the hearing now before this Hon-

orable Court; and further, affiant avers that said certified copy will show the actual sketch which the Honorable Commissioner of Patents accepted as proof, in lieu of the lost original device, and further, that the certified copy will show the citation of the said Brown patent as a reference against affiant and will also show the withdrawal, subsequently, of said Brown patent in view of the aforesaid proof, further affiant saith not.

(Sd.) HENRY A. AMMANN.

Subscribed and sworn to before me this 8th day of April, 1916. MONICA B. THOMPSON,

Notary Public in and for the State of Washington,
(L. S.) residing at Spokane.

*In the United States District Court for the
District of Oregon.*

No. 6718.

(Title.)

AFFIDAVIT OF GEO. W. BLOOD.

State of Washington,
County of Spokane,—ss.

George W. Blood, being duly sworn, doth depose and say that he knows Henry A. Ammann, and that he has been acting in the capacity of foreman for the above Henry A. Ammann in the Spokane Toilet Supply Company's plant for over three years preceding the date hereof.

That affiant has carefully read the affidavit of the said Ammann, executed the 8th day of April, 1916, and affiant avers that he was present when the first device

was tried out, and that photograph correctly shows the device as installed and tried out in accordance with the said Ammann affidavit; that affiant was also present when the device in the photograph was tried out, and affiant avers that to the best of his knowledge and belief that all of the statements made, and facts described in the said Ammann affidavit are true and correct; further affiant saith not.

(Sd.) GEORGE W. BLOOD.

Subscribed and sworn to before me this 8th day of April, 1916. MONICA B. THOMPSON,

Notary Public in and for the State of Washington,
(L. S.) residing at Spokane.

*In the United States District Court for the
District of Oregon.*

No. 6718.

(Title.)

AFFIDAVIT OF JOHN FRANK CLINTON.

State of Washington,
County of Spokane,—ss.

John Frank Clinton, being duly sworn, doth depose and say that he knows Henry A. Ammann, and that he has been acting in the capacity of bookkeeper for Henry A. Ammann in the Spokane Toilet Supply Company's plant for over three years preceding the date hereof.

That affiant has carefully read the affidavit of the said Ammann, executed the 8th day of April, 1916, and affiant avers that he was present when the first device

shown in photograph was tried out, and that photograph correctly shows the device as installed and tried out in accordance with the said Ammann affidavit; that affiant was also present when the device in the photograph was tried out, and affiant avers that to the best of his knowledge and belief that all of the statements made, and facts described in the said Ammann affidavit are true and correct, further affiant saith not.

(Sd.) JOHN FRANK CLINTON.

Subscribed and sworn to before me this 8th day of April, 1916. MONICA B. THOMPSON,

Notary Public in and for the State of Washington,
(L. S.) residing at Spokane.

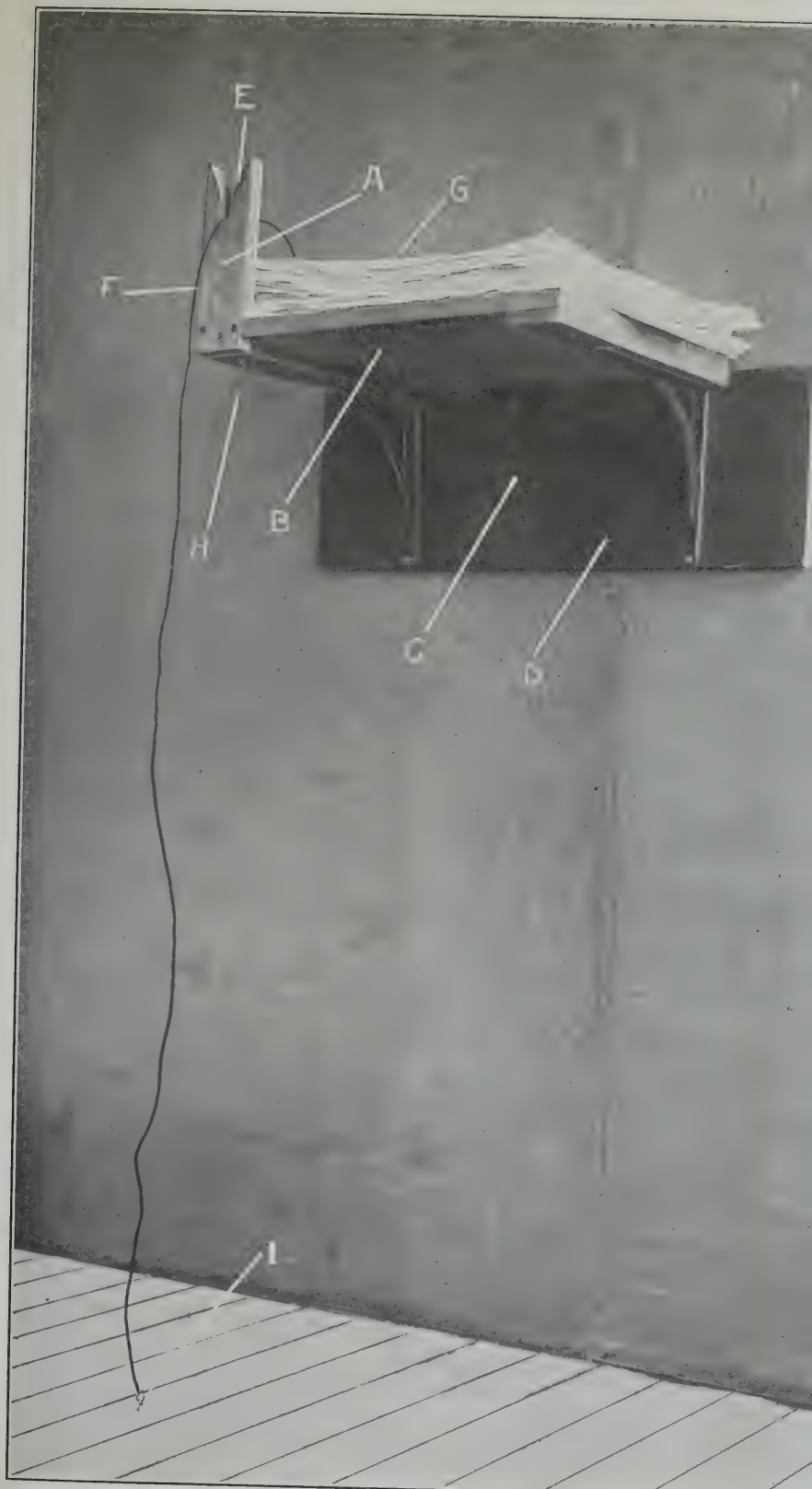
*In the District Court of the United States for the
District of Oregon.*

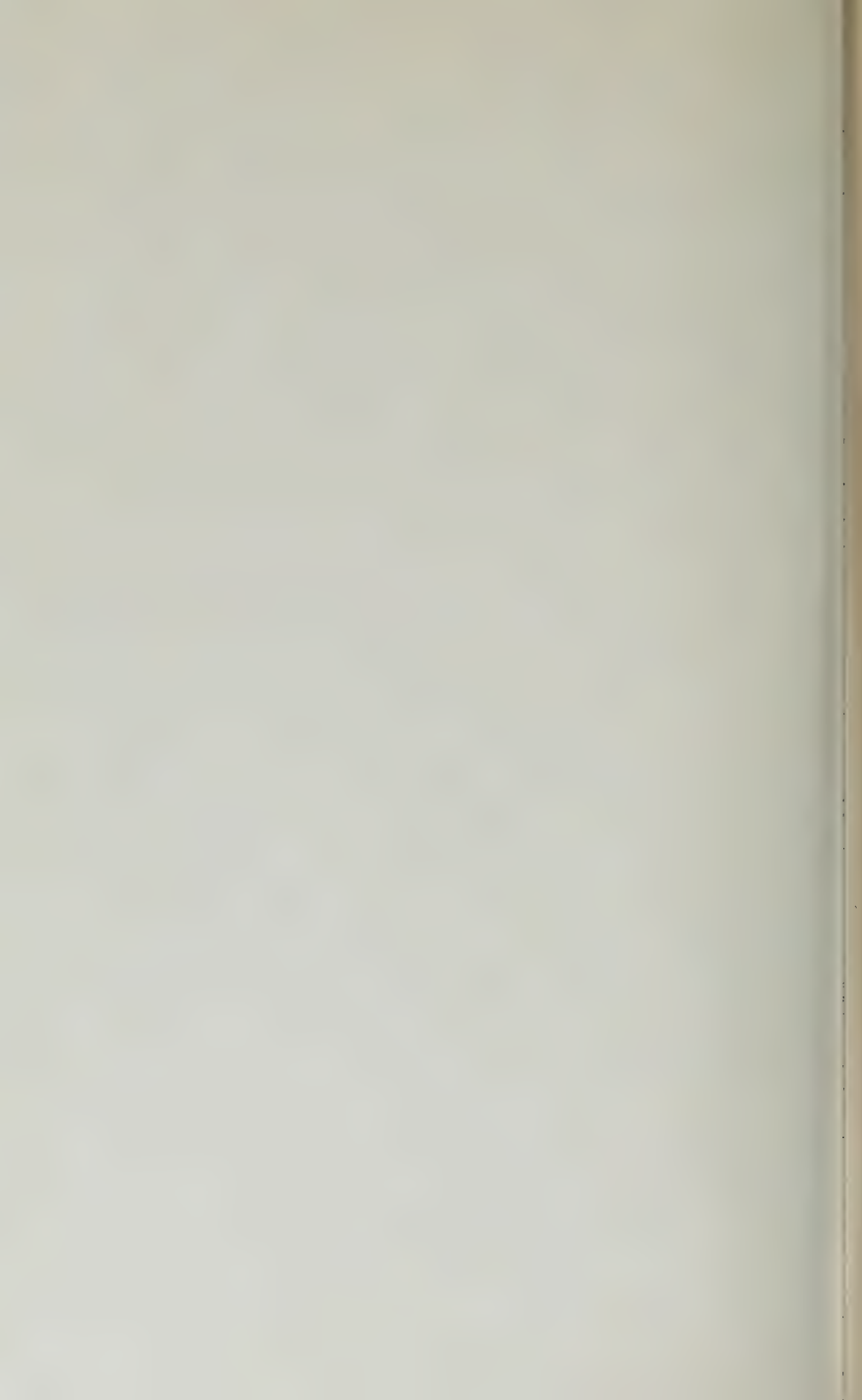
No. 6718.

(Title.)

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER.

And now come the above named defendants and move the Court, on the annexed petition of the above named defendants, verified April 4, 1916, and the matters therein referred to, for an order granting defendants leave to file the supplemental answer, also referred to in said petition, setting forth facts material to this cause which occurred subsequent to the filing of the original answer herein; also permitting defendants to prove the facts alleged by such supplemental answer, and for the re-hearing of this cause on such further proofs of defend-





ants; and that defendants have also such other and further relief in the premises as to the Court may seem meet.

Dated, April 4, 1916.

T. J. GEISLER,

Attorneys for Defendants.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

PETITION FOR LEAVE TO FILE SUPPLE-
MENTAL ANSWER AND TAKE
PROOFS THEREON.

*To the Honorable, the Judges of the Above Named
District Court:*

The petition of the Crystal Laundry Company, a corporation, and Percy G. Allen, respectively shows:

That this suit was brought to recover for the alleged infringement of letters patent of the United States granted to Charles F. Brown November 3, 1914, No. 1,115,895, on an application filed by said Brown August 13, 1913.

That the defendants answered, denying that said Brown was the first inventor of said invention, and also denying that they infringed the same, except inadvertently during the month of November, 1914, as by reference to Defendants' Answer will more fully appear.

That when Defendants' Answer was filed they had only such knowledge with respect to the state of the art as disclosed by the patents issued in the art.

That as defendants have only just ascertained, when they filed their answer in this suit, there were pending in the United States Patent Office two applications for letters patent on behalf of two other inventors, whose inventions were and are prior to the alleged invention of Brown described in the patent in suit, and one of said inventions apparently dominating all types of towel racks of the kind in question.

That, therefore, said prior inventions, and the letters patent issued and to be issued thereon, have a material bearing on all issues involved in this cause and tend to show:

First—That said Brown is not the first inventor of his alleged invention, as claimed in his alleged letters patent.

Second—That if said letters patent be upheld at all, the claims thereof must have a very strict construction placed thereon, and when so construed the device used by defendants after December 1, 1914, would not infringe in any event.

Third—That if said Brown's alleged invention, and the letters patent thereon granted, are valid, the alleged invention of said Brown is itself dominated by the invention of and the letters patent issued thereon to Jacques Rouso, dated October 19, 1915, and No. 1,157,046, and granted on an application filed January 12, 1912, thus long prior to the application of said Brown, which culminated in the patent in suit.

That said letters patent of Rouso controlled the use of any individual towel racks of the kind and type in

question in this suit, and therefore said letters patent control also the particular towel racks used by the defendants, and thus, though assuming that the device used by the defendants even during the period from November 1st to December 1, 1914, did infringe upon the patent in suit, such device of defendants would also, and to a much greater extent, be dominated by and tributary to said Rousso patent, and consequently defendants would have to settle with the latter too, which fact is very material in all phases of this cause, and particularly also on any accounting for profits alleged to be due complainant.

That defendants only just discovered the Rousso patent. That said patent not being issued at the time said Brown application for patent for his alleged invention was pending, said Rousso patent was not cited. That defendants have ordered a certified copy of said Rousso patent, and also of the file wrapper thereof.

That there was further filed in the United States Patent Office, prior to the issuance of the Brown patent in suit, an application on behalf of Henry A. Ammann for an improvement in towel racks, the filing date thereof being September 29, 1914, and the serial No. 864,049, and the patent in suit, as above mentioned, not being issued until November 4, 1914. That said application on behalf of said Henry A. Ammann is still pending, and no inspection thereof could be obtained by the public, and no knowledge thereof was possessed by defendants until the same was recently called to their attention by said Henry A. Ammann, and defendants were permitted to inspect said application of Ammann. That

from an inspection of said application of said Ammann it is apparent that the latter invented one of the devices used by defendants, and commonly referred to as the wire towel rack, and shown on the photograph hereto annexed marked Exhibit A, prior to the alleged invention by said Brown of his improvement forming the basis for the patent in suit. That defendants verily believe that said wire towel rack disclosed by said Exhibit A was invented by said Ammann prior to the alleged invention of said Brown, and the defendants are in possession of facts which, if proven, would fully substantiate these facts.

That defendants learned of the facts concerning said Ammann invention just recently, and in the following manner: That after the entry of the interlocutory decree in this cause on or about the 31st day of January, 1916, the defendants, being informed of the Ammann wire towel rack, obtained the license from said Ammann to use the same in their business, and purchased some of said racks from Ammann. That recently the complainants claimed that the Ammann towel rack was an infringement on the patent in suit, and procured the entry of a supplemental decree in this suit, adjudging the Ammann rack to be such an infringement. That defendants thereupon immediately communicated to said Ammann the fact that they were forbidden to use his said racks by reason of same being asserted to be an infringement upon the Brown invention described in the patent in suit, and said Ammann then informed defendants that he invented his own rack prior to the alleged invention of said Brown of his improvement. That im-

mediately upon receipt of said information defendants investigated the matter and believe that the claims of said Ammann, as to priority, are fully substantiated by the record of his said application, and the facts which defendants will be able to prove, as aforesaid. That, as above mentioned, said Ammann application has not yet been completed, but defendants, by permission of said Ammann, have ordered a certified copy of the file wrapper thereof for use in this cause. That since the complainants claimed that the Ammann wire towel rack is an infringement on the patent in suit, because subsequent to the invention thereby protected, proof of the fact that the Ammann invention was prior to the Brown invention covered by the patent in suit, would tend to show that the Brown invention was anticipated.

That proof of said facts, predicated on the inventions of said Rouso and said Ammann will furthermore show that whatever said Brown did invent it is but a very small portion of any of the towel racks used by the defendants even during said period from November 1st to December 1, 1914, and was not infringed by any device used by defendants since December 1, 1914.

Therefore defendants pray for leave to file a supplemental answer herein, alleging the facts above narrated concerning said Rouso patent and said Ammann application, and the inventions thereby covered.

That the proposed supplemental answer of these defendants is hereto attached, duly verified, and defendants pray that the same may be filed in this cause.

Defendants further pray that they be permitted to prove the facts above averred, and by said proposed supplemental answer alleged, concerning said Rousso patent and said Ammann application, and the inventions thereby covered.

Defendants further pray that this cause be re-heard on said further proofs of defendants, after the same have been introduced.

And defendants further pray for such other and further relief in the premises as to the Court may seem meet.

Dated, April 5, 1916.

CRYSTAL LAUNDRY COMPANY,

By Percy G. Allen, President.

PERCY G. ALLEN,

Defendants.

I, Theodore J. Geisler, of counsel for the above named defendants, hereby certify that I have read the foregoing petition, and I verily believe the same well founded in fact and law as therein represented, and that the defendants are entitled to the relief therein prayed for.

T. J. GEISLER.

United States of America,
District of Oregon,—ss.

I, Percy G. Allen, being first duly sworn, depose and say that I am the president of the corporation, the Crystal Laundry Co., one of the defendants in the above entitled suit, and am also the Percy G. Allen named as the other defendant in said suit, that I have read the

foregoing petition, and that the same is in all respects true, as I verily believe. PERCY G. ALLEN.

Subscribed and sworn to before me this 5th day of
April, 1916. S. S. GILLESPIE,
(L. S.) Notary Public for Oregon.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

PROPOSED SUPPLEMENTAL ANSWER.

*To the Honorable, the Judges of the Above-named
District Court:*

And now come the above-named defendants, Crystal Laundry Company, a corporation, and Percy G. Allen, and by leave of Court make supplemental answer to the bill of complaint herein as follows:

That as set forth in the original answer, this suit was brought to recover for the alleged infringement of the alleged letters patent of the United States granted to Charles F. Brown, November 3, 1914, No. 1,115,895, on an application filed by said Brown August 13, 1913.

That in the original answer defendants denied that said Brown was the original and first inventor of said invention, and also denied that they infringed the said letters patent purported to be granted therefor, except inadvertantly during the month of November, 1914, all of which by reference to defendants' said answer will more fully appear.

That, as defendants have ascertained since the filing of their said original answer, there were pending in the United States Patent Office two applications for letters patent on behalf of two other inventors for improvement in towel racks, whose inventions were and are prior to the alleged invention of Brown purported to be patented in the patent in suit. That one of such applications was filed by Jacques Rouso January 12, 1912, and matured in letters patent dated October 19, 1915, and No. 1,157,-046, and that the other of said applications was filed by Henry A. Ammann, of Spokane, Washington, on the 29th day of September, 1914, under Serial No. 864,059, and thus was pending when the patent in suit issued, and that said application of said Ammann is still pending in the United States Patent Office, but defendants, by permission of said Ammann, have had an inspection of his said application.

That defendants are further informed by said Henry A. Ammann, and verily believe, that the invention by him in his said application described was invented by him prior to the alleged invention by complainant's patentee, said Charles F. Brown, of the alleged improvement in towel racks which the patent in suit purports to cover.

And defendants further aver that they are now informed and verily believe that said Charles F. Brown, complainant's patentee, was not the original and first inventor or discoverer of the combinations set forth in the claims in the patent in suit, or of any of the material or substantial parts of said combinations, or any other

improvement in towel racks purported to be covered by the patent in suit, but that said combinations, and the material and substantial parts thereof, and said alleged improvement by said Brown was known in the prior state of the art as disclosed by the patent specified in the original answer of defendants, and as further and particularly disclosed by the patent to Jacques Roussø, the patent to Guy Reid, set forth in the original answer in this suit, and by said application for patent of said Henry A. Ammann, of Spokane, Washington; and was furthermore known and used by said Ammann prior to the alleged invention thereof by said Brown; and that therefore the patent in suit always has been and still is wholly null and void.

And these defendants further aver that if there is any improvement in Towel Racks invented by said Brown and covered by said alleged patent in suit, such alleged improvement was and is of the most specific and limited character, especially in view of the matters herein set forth, and therefore must be construed accordingly, in order not to encroach upon the rights vested in prior inventors, and their assignees and licensees, and the general public at the time said Brown invented his alleged improvement, and which rights still are so vested. And furthermore, whatever improvements in Towel Racks may have been invented by said Brown, or which the patent in suit purports to cover, is itself dominated by the aforesaid patent of Jacques Roussø, since the issuance of the latter, and therefore, if defendants are to be held to account to the complainants herein, they should have their accountability determined and limited

with due regard to said patent issued to said Jacques Rousso and the obligations of defendants' thereunder.

WHEREFORE these defendants pray that they be permitted to make proof of the matters in this supplemental answer alleged; that they have the relief prayed for in their original answer, and also such other and further relief in the premises as to the Court may seem meet and in accordance with equity.

CRYSTAL LAUNDRY COMPANY,

By Percy G. Allen, President.

PERCY G. ALLEN,

Defendants.

T. J. GEISLER,

Solicitor and of Counsel for Defendants.

Here follows verification.

United States of America,

District of Oregon,—ss.

I, Percy G. Allen, being first duly sworn, depose and say that I am the president of the corporation, the Crystal Laundry Co., one of the defendants in the above-entitled suit, and am also the Percy G. Allen named as the other defendant in said suit, that I have read the foregoing proposed Supplemental Answer, and that the same is in all respects true, as I verily believe.

PERCY G. ALLEN.

Subscribed and sworn to before me this 5th day of
April, 1916.

(L. S.)

S. S. GILLESPIE,
Notary Public for Oregon.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

**ORDER DENYING MOTION TO VACATE
SUPPLEMENTAL DECREE.**

The defendants having filed a petition, verified April 5, 1916, accompanied by the affidavits of Percy G. Allen, John A. Clancy, Amos Burg, Wm. C. Schmitt, Vivian Flexner, Henry A. Ammann, George W. Blood, John Frank Clinton, and the exhibits to such affidavits attached, and moved thereon for an order of this Court vacating and dissolving the supplemental decree entered in this cause on the 21st day of March, 1916, whereby this Court did extend and continue the injunction herein issued pursuant to the interlocutory decree entered January 31, 1916, to a certain towel rack adopted and used by defendants since the entry of said interlocutory decree of which towel rack a photograph marked Exhibit A is annexed to said petition; and said petition and motion thereupon coming on to be heard, the complainants appearing by their counsel, but not having filed any affidavit or other papers in opposition to said petition; now, after hearing counsel for the respective parties, it is, upon consideration thereof,

ORDERED that the petition, and the motion of defendants thereon to vacate and dissolve said supplemental decree, be and the same is hereby in all respects denied.

And the defendants conceiving themselves aggrieved by said determination of this Court in the premises, then

and there stated in open Court that they desired to appeal to the United States Circuit Court of Appeals, and asked the court now to fix the penalty of the bond on such appeal, and the court did thereupon further

ORDER that the penalty of such bond shall be one thousand dollars.

Dated, April 17, 1916.

CHAS. E. WOLVERTON,
Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

**ORDER DENYING DEFENDANTS LEAVE
TO FILE SUPPLEMENTAL ANSWER.**

The petition of the above-named defendants, verified April 4, 1916, praying for an order granting them leave, under rule 34 of the Equity Rules, to file a supplemental answer alleging certain facts claimed by defendants to be material to this cause, and set forth in said petition and the proposed supplemental answer therewith filed, and permitting defendants to prove the facts alleged by such proposed supplemental answer, and that defendants have also such other and further relief in the premises as to the Court may seem just, came on to be heard before the Court at this time, complainants appearing by counsel but not having filed any affidavits or other papers in opposition to said petition; and thereupon, after hearing counsel for the respective parties, and upon consideration thereof, it was

ORDERED that said petition be and the same is hereby in all respects overruled and denied.

Dated, April 17, 1916.

CHAS. E. WOLVERTON, Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

ASSIGNMENT OF ERRORS.

The above-named defendants, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered herein April 17, 1916, refusing, on the motion of defendants based on their petition verified April 5, 1916, to dissolve and vacate the supplemental decree entered in the above entitled suit March 21, 1916, whereby this Court did extend and continue the injunction herein issued, pursuant to the interlocutory decree entered January 31, 1916, to a certain towel rack adopted and used by defendants since the entry of said interlocutory decree, do hereby assign the following as the errors committed by said District Court therein, to-wit:

I.

The District Court erred in finding the towel rack (designated on this appeal Exhibit A) adopted by defendants after the interlocutory decree herein entered January 31, 1916, to be covered by the patent in suit, and extending and continuing the injunction of said

decree to said towel rack by the entry of said supplemental decree on March 21, 1916.

II.

The District Court erred in entering the order of April 17, 1916, denying the motion of defendants to dissolve and vacate said supplemental decree, and in refusing to take all the proofs of the parties either before itself, or the Master, regarding the premises.

III.

The District Court erred in entering said supplemental decree in the course of summary contempt proceedings, notwithstanding the Court had previously and in conformity with said interlocutory decree appointed a Master for ascertaining and reporting the use by defendants of the invention covered by the patent in suit, and the proceedings before such Master were pending at the time; and that in consequence defendants were taken by surprise, had no opportunity of presenting their defense, and were deprived of their substantial rights in the premises.

IV.

That the proceedings of the District Court with respect to said towel rack were erroneous, and not in accordance with the usual and better practice of courts of equity in the premises, for it compelled the defendants to defend their rights in the premises piecemeal, and in so doing imposed upon defendants unnecessary and avoidable expense. -

V.

That the District Court erred in refusing to permit defendants to prove the undenied facts alleged in the papers on which defendants moved to dissolve and vacate said supplemental decree, and which facts showed that said towel rack anticipated the invention purported to be covered by the patent in suit; and the District Court's said acts deprived the defendants of their substantial rights in the premises.

VI.

The District Court erred in not finding that, on the undenied facts shown by the papers on which defendants' motion to dissolve said supplemental decree was based, if said towel rack infringes the invention covered by the patent in suit, then, by reason of antedating said alleged invention, said patent is void.

VII.

That the entire proceedings of the District Court in the premises were erroneous and were to the prejudice of the substantial rights of the defendants, and resulted in an improvident use of the powers of said court.

Dated, April 20, 1916.

T. J. GEISLER,
Attorney and of Counsel for Defendants.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

**PETITION ON APPEAL AND ORDER OF
ALLOWANCE.**

The above-named defendants, conceiving themselves aggrieved by the supplemental decree in the above-entitled suit entered March 21, 1916, whereby this Court did extend and continue the injunction herein issued pursuant to the interlocutory decree entered January 21, 1916, to a certain towel rack adopted and used by defendants since the entry of said interlocutory decree, and furthermore, conceiving themselves aggrieved by the order entered herein April 17, 1916, refusing to dissolve and vacate said supplemental decree on the motion of defendants based on their petition verified April 5, 1916;

THEREFORE the defendants do hereby appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed, and that a transcript of the records and proceedings of the District Court, on which said supplemental decree and said order were founded, may be sent, duly authenticated to said Circuit Court of Appeals.

Dated, April 20, 1916.

CRYSTAL LAUNDRY COMPANY,

By Percy G. Allen, President.

PERCY G. ALLEN,

Defendants.

T. J. GEISLER,

Of Counsel for Defendants.

And thereupon it was ORDERED by said District Court that the appeal above prayed for be allowed; and it is further

ORDERED, upon the defendants giving a bond in the penalty of one thousand dollars, approved by this Court, that further proceedings in this suit pending on said appeal be stayed.

Dated, April 20, 1916.

CHAS. E. WOLVERTON,
District Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Crystal Laundry Company, a corporation, and Percy G. Allen and Amos Burg, of Portland, Oregon, surety, are held and firmly bound unto the above-named complainant in the sum of one thousand dollars, to be paid to the said complainant, or its legal representatives, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated April 20, 1916.

WHEREAS, the above-named defendants have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order entered herein April 17, 1916, refusing to dissolve and vacate the supplemental decree in the above-entitled suit entered March 21, 1916, whereby this Court did extend and continue the injunction herein issued pursuant to the interlocutory decree entered January 31, 1916, to a certain towel rack adopted and used by defendants since the entry of said interlocutory decree.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendants shall prosecute said appeal to effect, and answer all damages and costs awarded against them if they fail to sustain their appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

CRYSTAL LAUNDRY COMPANY,

By Percy G. Allen, President.

PERCY G. ALLEN.

AMOS BURG, Surety.

Signed, sealed and delivered in the presence of:

Wm. C. Schmitt.

Cecil Long.

United States of America,

District of Oregon,—ss.

I, Amos Burg, of Portland, Oregon, being duly sworn, depose and say that I am the surety in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated

therein, the sum of one thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

AMOS BURG.

Subscribed and sworn to before me this 20th day of April, 1916.

WM. C. SCHMITT,

Notary Public for Oregon,

L. S. My commission expires Sept. 8, 1916.

I hereby approve of this bond, April 21, 1916.

CHAS. E. WOLVERTON,

District Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718

(Title.)

A CONDENSED STATEMENT OF THE TESTIMONY
TAKEN ON THE TRIAL
OF THIS CASE.

RALPH P. MEYER, called as a witness on behalf of plaintiff, being first duly sworn.

DIRECT EXAMINATION.

Questions by Mr. Atkins:

I am the vice president of the Brown-Meyer Company, the plaintiff in this case.

Plaintiff's Exhibit A in the case is the patent to C. F. Brown. It is a towel device for the use of individual towels in public use. On this patent this suit is brought.

This article (referring to Plaintiff's Exhibit C) is the article described in the patent in suit, and in use in different public buildings in the city. It corresponds in every particular with the device described in the patent. In service, that is, in practice, this shelf is placed on the wall, with screws fastened in. We have a plate, and we have an assembling member that fits in this plate with a shoulder, an eye through the assembling member whereby the chain connects the assembling member with a lock, and the shackle on the lock to the eye underneath the shelf. That admits of the towels being freely handled in this method. This shackle fits through the loop of the chain that it locks. That retains the towels. Now, the length of the chain gives plenty of room for more than one individual to use it, giving freedom

of the chain so that two or three could use it in case of necessity. The towel is brought over, used, and dropped into a receptacle, or on the floor.

A device similar to that device was used by the defendants. It resembles this device in evidence exactly. It was an exact duplicate.

Knowledge of such use by defendants first came to me about November 10, 1914. Such use was made in the Courthouse of the city, and the Broadway building. The Crystal Laundry Company used the device in the latter place, and the Broadway Towel Supply Company used it in the Courthouse.

MR. GEISLER: We have those devices here, and when it comes to our part of the testimony, we will introduce them in evidence.

COURT: You admit that defendants' device as used between November 3, 1914, and about the beginning of December, 1914, is an infringement of the patented device?

MR. GEISLER: Well, it was at that time. It is not now.

COURT: Because you are not using it, or have you changed it?

MR. GEISLER: We have changed it, your Honor.

Device in evidence marked "Plaintiff's Exhibit C."

Both of the defendants used this device about the month of August, 1914, prior to our patent. This use began with the Broadway Towel Supply in the Courthouse in August of 1914. We had the contract there,

defendants' device was put in at a cheaper price, and we lost the contract from July of that year.

The defendant, the Broadway Towel Supply Company used this device, substantially identical with ours, to oust us from our contract in the Courthouse.

The use of this device by defendant continued until after we had acquired our patent, and our attorney had written them regarding the infringement. After that day, they made some little change in it.

I think that the device which they are now using is an infringement of our patent.

I saw that device in use in the Courthouse last Friday. Referring to Plaintiff's Exhibit C. The free end of the chain is secured to the bottom of this upright post, and the latter is also secured in place by the shackle of the lock. The latter is inserted through the end of the chain, which we open up a link a little bit, and that slips through, and then it enters into the assembling member here (illustrating on Exhibit C) and that connects the two. The construction of this chain is such as to permit the expanding of the terminal link to receive the shackle. It answers the purpose of a ring.

CROSS EXAMINATION by Mr. Geisler.

Q. You say that the Broadway Towel Supply Co. commenced using this device which you claimed was an infringement on your letters patent in August, 1914, for the purpose of ousting you, in the use of your device, from the Courthouse?

A. I did.

Q. What makes you make that statement?

A. Well, we had the contract, and the Broadway Towel Supply had been running after them, and they agreed to put in the same device at a cheaper price, and the Courthouse accepted the proposition.

Q. You had a contract with the Courthouse of Multnomah County, you say, at that time?

A. I did.

Q. Is it not a fact that your contract with Multnomah County Courthouse expired about July 1, 1914?

A. It did.

Q. Then, what makes you say, I repeat, that the Broadway Towel Supply Company ousted you from the Multnomah County Courthouse?

A. Because Multnomah Courthouse informed us that the price was cheaper, and they could get the same thing to hold their towels that we had, and they naturally would accept the cheaper price.

Q. It was awarded, I understand, to the Broadway Towel Supply Company on competitive bid, was it, or not?

A. I think not. We had no bid whatsoever. We were just notified. We never had a bid on the contract. That would be the 1914 to 1915 year.

Q. You did not bid, then, for the work at the Multnomah County Courthouse?

A. No.

Q. In fact, you made no attempt to renew your contract with the Multnomah County Courthouse? Is that correct?

A. They didn't give us any opportunity.

Q. And you just let the matter rest?

A. No; oh, no.

Q. What did you do to try to get a contract from the Multnomah County Courthouse?

A. I went to see them about it, and asked them why we should lose it. The service was satisfactory.

Q. I will show you here a model, consisting of an upright support, which we will assume represents a wall, and on that wall is affixed a bracket—is that correct? Which bracket corresponds with the bracket of the device that you put in evidence.

A. Well, I don't know as the bracket makes any difference, whether it is underneath or above.

Q. Well, it is a mere shelf?

A. It is a shelf.

Q. And this shelf on this model that I speak of is a mere shelf?

A. That is a shelf.

MR. ATKINS: If your Honor please, I should like to ask whether this model is to be offered in evidence?

COURT: I presume it will be.

MR. GEISLER: Oh, yes. If it wouldn't be out of turn, I would offer it in evidence now, as far as that

is concerned. Do you consent to my offering it in evidence now?

MR. ATKINS: When it is proven, yes.

MR. GEISLER: All right.

Defendants here introduce in evidence, by consent, device marked "Defendants' Exhibit 1."

A photo cut of such device is here shown.

Cross examination continued.

That was the device which was used by defendants from November 3d to December 1, 1914.

After December 1st a change was made in this device.

The basket has a piece of metal by which the ring is fastened. This ring is open on the side, thereby giving a link to which to fasten the lower end of the chain, just the simple matter of looping it over. Now, it is just as easy, unlooped, to slip that off and shackle it back to the original upright. It is not fastened firmly there. It is made for the purpose of slipping off. And it appears to me that that is just getting away slightly from the connection to the upright.

Prior to December 1st the defendant Broadway Towel Supply Company, and also the Crystal Laundry Company, fastened the lower end of the chain to the shackle of the lock, and the lock itself was fastened to the bottom end of the post.

Then the lower end of the chain was removed from the shackle of the lock, the lock was merely used thenceforth to keep the post in place, and the lower end of the

chain, instead of being in any way connected with the shackle of the lock, or to the bottom end of the post, was fastened to a ring in the basket.

Plaintiff rests.

WILLIAM C. SCHMITT, called as witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. Geisler.

MR. GEISLER: I offer in evidence the file wrapper covering the plaintiff's patent.

Marked "Defendants' Exhibit 2."

MR. GEISLER: I will next offer in evidence the patents which are cited by the examiner in this case, and which the inventor had to avoid in order to get even the narrow patent that he did get. The first patent I offer in evidence is that granted to N. S. Baldwin and E. S. Goodwin, April 7, 1896, No. 557,754.

Marked "Defendants' Exhibit 3."

I next offer the patent granted to J. G. Cooner, December 29, 1908, No. 908,076.

Marked "Defendants' Exhibit 4."

I next offer the patent issued to J. Rousso, April 9, 1912, No. 42,398.

Marked "Defendants' Exhibit 5."

I next offer the patent issued to T. K. Taylor, February 4, 1913, No. 1,052,292.

Marked "Defendants' Exhibit 6."

Next the patent issued to Guy Reid, July 15, 1913, No. 1,067,622.

Marked "Defendants' Exhibit 7."

MR. GEISLER: I call particular attention to this patent of Guy Reed as showing all the essentials of the alleged invention, barring the moving of the point of the chain from one place to another.

I also offer in evidence the patent issued to T. Heins et al., November 11, 1913, No. 1,078,501.

Marked "Defendants' Exhibit 8."

Also the patent issued to Louis Straub, September 17, 1912, No. 1,038,984.

Marked "Defendants' Exhibit 9."

MR. SCHMITT testified: I am 29 years of age and reside at 380 East Forty-fourth Street North, this city.

I am a civil engineer and mechanical expert.

I graduated from Notre Dame University in June, 1910, in the Civil Engineering department.

Since I graduated from college I have been following particularly patent work.

I am now engaged in such work, in addition to general engineering work.

I am also regularly admitted to practice before the United States Patent Office.

Witness shown patent issued to L. Straub, being "Defendants' Exhibit 9."

I have examined that patent. This model embodies the particular features shown in this patent to Straub.

Model offered in evidence as "Defendants' Exhibit 10."

Model admitted subject to objection if it fails to correspond with patent.

The post in the Straub device has a rotary movement similar to the post in the Brown patent.

With respect to the use of means for holding this Straub rotary post in place, so that it cannot be withdrawn, I do not think there is anything specially original to use means such as employed for that purpose by Brown in his patent. It would be a waste to use two locks, one for locking each post, so therefore that locking bar is substituted, which permits the use of one lock to keep both posts from being withdrawn or rotated. I consider this post, which is made with a curved end, and which is adapted to be rotated, to be the equivalent of the post in the Brown device.

I have examined the Reid patent, No. 1,067,622, being Defendants' Exhibit 7.

Model marked "Defendants' Exhibit 11" offered in evidence as representing the Reid patent. Model admitted subject to objection for any discrepancies that may be pointed out therein.

Witness continues:

Figure 4 of the Reid patent shows another construction, and in this case it is practically identical with the construction of the patent in suit, except that in the Reid

device the end of the chain is fastened to the wall instead of being fastened to the end of a post.

COURT: That is the very thing that the defendants want to get away from here. The end of the chain is fastened to a basket instead of being fastened to the end of a post. But I understand the Patent Office has said in effect that that device was not an infringement upon the plaintiff's device; that is to say, the Patent Office had this device under consideration at the time it issued plaintiff's patent.

MR. GEISLER: Exactly, your Honor.

COURT: Well, do you want this Court to say that the Patent Office is mistaken in that respect?

MR. GEISLER: No, your Honor. No, I wish the Court to affirm the decision of the Patent Office.

COURT: Well, I understand the Patent Office, when it issued the plaintiff's device, had this device before it, and, notwithstanding the consideration of this device, it issued the plaintiff's patent.

MR. GEISLER: Yes, your Honor, correct.

COURT: So therefore the Patent Office has said that this device was not an anticipation of the plaintiff's device.

MR. GEISLER: And in that the Patent Office, we will say, was correct. It is a very close question. This is a combination patent which the Patent Office granted to Brown. A combination patent assumes that each of the elements which are associated in a particular form are old and public property, because it was in the

power of the application for patent, if he chose and if he so claimed, to cover any particular element by itself, irrespective of the combination. But in this particular case there are four claims allowed, and each of these four claims covers merely a combination. Now, then, it also is governed by the rule which controls combination patents, as laid down by our United States Supreme Court, and followed in every tribunal where the question has come up, which rule is this: That, in order to anticipate or infringe a combination patent, the two devices which are compared must agree in three different particulars. Those three particulars are (1) the means must be identical; the law of cooperation which controls the use of the means must be identical; the purpose for which the means was so cooperatively employed must be identical. And failure in that particular, or in any one of these points of comparison, would make the device, as the case may be, either an anticipating device or an infringing device. Now, as far as the two devices here are concerned, there is quite an elaborate argument in the file wrapper. In the first place, the examiner decided not to allow anything. Finally, by the persuasion of counsel, he was induced to allow this narrow claim. The narrow claim, your Honor, merely introduces a purpose and a new result in the Brown device which differentiates it from the Reid device. We claim that we are following the Reid device, and not the Brown device. The Reid device, of course, was applied for before the Brown device was applied for. In fact, the patent had been issued before the Brown application was placed on file. So it is presumed, as a matter of law, of course, that Brown, what-

ever he invented, invented with the Reid device in his mind, and attempted to get some improvement over that, which Reid did not have.

And just one more matter. The only point that he claimed is this, your Honor—that by bringing the two ends of the chain closely together he gets a greater sweep of the chain, and claims to have greater convenience. And if we take the Reid device and bring the lower end of the chain in close proximity with the upper end, then we get the same sweep of the chain that the plaintiff has made such a difference as to entitle him to a patent; and on that alone was the patent issued.

COURT: This is a very narrow issue. You claim that you are using more nearly the Reid device than you are the Brown device?

MR. GEISLER: Yes, your Honor.

Examination of witness continued:

I have looked over the Brown device and find that all of the elements in there are old, well-known elements. I cannot find a single one that has not been well known for some time.

CROSS EXAMINATION.

I referred to elements of this device singly by themselves.

I am acquainted with the Brown patent sued upon in this case, and am familiar with the construction of the device and the mode of its operation.

Plaintiff's Exhibit C correctly represents the subject matter of the Brown patent. The assembling member

or post is secured to the shelf by a lock, which prevents it from being drawn out.

The lock also performs the function of securing the end of the chain to the bottom of the assembling member. It serves, as a single element, to perform those two functions.

When the towels for service are laid upon the shelf, the apertures 22 on the corner of them, as shown here, are brought into line with the socket in the shelf. When so aligned, the assembling member may be introduced through all of the apertures of the towels into the socket, but it strikes me a more practical way would be just to string them on here first.

If the pile of towels were arranged with the apertures in the corner in line, that pile could be laid upon the socket and secured as a single member to the shelf, by the introduction through the apertures of the assembling member without handling the intermediate towels.

When the towels are in place upon the shelf, the topmost towel can be removed and strung out upon the chain and the user therefore has the full stretch of the chain to enable him, or to permit him, to use the towel, without coming in contact with the shelf. It would be possible for several to use towels upon that chain at the same time without interfering one with another, through perhaps each one would not have the same efficiency as if they were using them singly.

COURT: That would depend upon the length of the chain?

MR. ATKINS: Exactly.

Referring to the model, Defendants' Exhibit 11, there is a different type of lock in the Reid patent, though they are both standard locks.

The end of the projecting arm shown in the model Exhibit 11 is different from that shown in the Reid patent. The end of said arm, to which the chain is attached, is also different from that shown in the patent. It is curved to a different degree. The construction shown in the two patents shows curved ends on each of them, but the degree of curve is different in the model.

The difference between the model and the Reid patent is adapted to correct a deficiency in the Reid construction. It would appear to me that that curvature was put on there in order to keep the towels from slipping. The device on the free end of the chain in the Reid patent is different from that shown in the model, No. 11.

Referring to the Straub patent, Defendants' Exhibit 9, the bail, section 6, as it is called in that patent, is immovable while in service. It is only movable for the purpose of applying towels to it. When the towels are applied it is immovable. The soiled towels are separated from the clean towels in service only by the width of the receiving plate 2. There is no chain connection of any sort on the Straub device.

There is this difference between plaintiff's device and the Straub device, in respect to the assembling member 4 of the one and the bail section 6 of the other, namely, that plaintiff's assembling member 4 is rotat-

able when it is in service, and the Straub bail section 6 is rotatable only when it is not in service.

W. C. H. SMITH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the partners of the Broadway Towel Supply Company, and was such partner in July, 1914.

I heard Mr. Meyer testify here about ousting plaintiff's device from the Multnomah County Courthouse, and the instituting of our own towel rack. The circumstances in connection with our getting the business there at the Courthouse were:

I went up to the Courthouse, and I was talking to the commissioners there, and I had asked them if I could get the business, and they told me yes. And I knew a couple of them pretty well. I took the bid at 28 cents a hundred. They asked me if I could put the towels in for that. I told them yes. So they gave me a contract for one year. They never asked me what kind of shelf I would put in, or anything. They just asked me if I would put in the towels. I told them I would. So I finally had a rack made, and I seen the racks they had in there, and I took the copy of them, but not exactly like theirs—a little bit different. And I noticed underneath the rack there was no patent, nor nothing on the racks to show there was any patent on them. And thinking there was no harm about it, I went ahead and had the carpenter make some. A little while afterwards, I was notified not to use those racks any more. So I

finally went to Mr. Geisler, and he told me he would see into the matter. So I left it to him, and finally he told me to make a change. I finally made the change. I disconnected the chain from the lock and fastened it into the basket. And from that time on I went every day, and noticed the chains were never put back onto the locks any more. They was always fastened to the basket.

The County Commissioners did not demand of me that we furnish any particular kind of device.

I first found out that Mr. Brown, or Brown-Meyer Company, or the Yale Laundry Company, claimed a patent on their towel rack about a week later. I think it was a week later. I went down to one of the buildings, and I looked at the shelves there to see if there was any patent applied for, and I found out there was just a little stamp, stencil stamp, was put underneath the board. There was "Patent applied for" and that is all I noticed.

I first found out that they had obtained a patent I think in November, 1914. Then I went to see our attorney about it, to find out the facts in the case with regard to the patent.

And then after that I made this change of disconnecting the lower end of the chain from the bottom of that post and dropping it into a basket, fastening it to a basket.

After I made that change, I had occasion to go into the buildings where the device was used, and see how it was being used every day, and found that they were

using it just the way that I told them to use it, with the lower end of the chain disconnected with the bottom of the post.

MR. GEISLER: Mr. Atkins and I are going to stipulate that the Broadway Towel Supply Company, for the purpose of adjusting this infringement between November 3, 1914, and approximately December 1, 1914, offered to pay the plaintiff here \$25. It is so alleged in the answer, and by stipulating it, we can shorten the record.

MR. ATKINS: Yes.

MR. GEISLER: And that the offer was made after we had given them an itemized statement showing that the actual profit made was not to exceed \$7.50 for the use of that same device during that period of time. Also that the plaintiff refused the offer, that is to say, Brown-Meyer Company, and demanded the sum of \$500 in settlement of that period. That is correct.

MR. ATKINS: It is stipulated to that extent, except, of course, as to the itemized statement, we know nothing about that. There was a statement rendered, but it was not made under oath, and it did not conform to our view of the facts. We do stipulate that there were negotiations for settlement, that an offer of \$25 was made, and that a counter proposition was made.

MR. GEISLER: We are also going to stipulate, I believe, that we have witnesses here that will corroborate Mr. Smith, on behalf of the Broadway Towel Supply Company, and Mr. Clancy, who will testify later in behalf of the Crystal Laundry Company, to the effect

that it was their duty in the capacity of janitor or superintendent of these various buildings to inspect these devices as used in their buildings daily, and that they were not used other than by having the lower end of the chain hanging down and connected to a basket; not used as the Brown device was used, but used as we demonstrate here.

Examination of witness continued:

I kept the books of the Broadway Towel Supply Company, and I kept track of the towels I put in every day in the buildings, and I don't think our profits amount to over about \$7.50 for that time till we started putting the chains underneath. Really there is no profit in it at all; hardly, to keep the whole business.

CROSS EXAMINATION.

In examining the plaintiff's devices in the Court-house, I found no patent mark. Later, after we were notified, I found "Patented" marked on some of the devices that were used.

I made this change I referred to just after I was notified not to use them under the lock any more.

I got a notice not to use the chains fastened to the lock any more, to discontinue from using them. I finally put them to the end of the basket. That was, I think, just some time near December 1, 1914, after the patent came out.

It was about the 3d of November, 1914, that I got notice from the lawyer not to use them chains any more the way I was using them.

I had consulted Mr. Geisler with regard to the question of infringement at that time.

We got notice from plaintiff's company to desist from infringement.

My attorney told me not to fasten the chains underneath the lock any more, so I guess he must have had the notice.

I used this particular kind of device in the Courthouse because I saw it there, and I didn't think there was any patent on it; it is such a simple thing to copy after. There was no "Patent applied for," I think, which the law requires, when you put out an appliance, that you have to put on it before you put them out. That is the way I understand it.

I did not reproduce the plaintiff's device exactly. Ours is a little different, but it works just the same as the other, and was a substantial duplicate of it.

I was not required to use any particular sanitary device in the Courthouse. I was just to put in my own ideas, but was required to install some such device. The one I installed was the one they had been using before I put ours in.

Here defendants offered in evidence an extract of the Ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29,270, pertaining to the prohibition of roller towels in public places, and such extract of the Ordinance was duly received and reads as follows:

"ORDINANCE No. 29,270.

An Ordinance to prohibit common drinking cups and common towels in the City of Portland, and providing a penalty for the violation thereof, the City of Portland does ordain as follows:

1. No person, firm or corporation in control of, or in charge in the city * * * public building * * * or in any lavatory maintained or used by the general public shall place, furnish or keep any common towel for public use, or permit their use.

2. * * * The term 'common towel' as used herein shall be construed to mean roller towel, or towel intended or available for common use by more than one person and not being laundered after such use.

3. Any person, firm or corporation violating any of the provisions of the Ordinance shall, upon conviction thereof in the municipal court be punished by a fine of not less than ten dollars nor more than two hundred dollars.

Passed by Council, July 29, 1914.

AMOS BURG, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I reside in Portland, and am one of the partners of the Broadway Towel Supply Company.

I went down to see Mr. Brown. I says, "It is a pity that we have to go to court for a trifle like this. Let's settle it up, whatever it is." So he didn't give me any

particular answer; he thought it best for the court to decide it. So later on we arranged a meeting. We have what is called a Laundrymen's Club here in the city. And Mr. Brown and myself, Mr. Meyer and Mr. Allen, we met up there.

We talked the matter over, and the Brown-Yale people, or Mr. Meyer and Mr. Brown, told us that they would settle for \$250.00. We, we wasn't prepared—there was another party into it, Mr. Bechtel, from the Palace Laundry, and we were to see him in the meantime—I think he was out of the city; or some way Mr. Allen was to see him. And finally Mr. Allen telephoned me, and he says, "You better see Mr. Bechtel, because I can't catch him."

The first thing we knew, why, they sued us, and that was the end of it. We asked Mr. Brown to give us ten days to consider settlement. There may have been some two weeks thereafter before action was brought.

Our profits on the towel supply between the 3d of November and the first of December, 1914, figures \$7.50 but we offered them \$25.

CROSS EXAMINATION.

This conference took place before the suit was brought.

P. G. ALLEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

MR. GEISLER: Now, with respect to the Crystal Laundry Company, defendant, we will stipulate, if your Honor please, if Mr. Atkins will consent, that they made

an offer of \$50 to settle for the infringement during the period from November 3, 1914, to December 1, 1914, and that the offer was declined, and the plaintiff corporation demanded \$300. Isn't that right?

MR. ATKINS: As set forth in the answer, whatever that is. In agreeing to this stipulation, of course, your Honor will observe that there was a difference in each case between the plaintiff and the defendant as to the nature of the infringement. They wish to hold that they had entirely avoided infringement, and it was upon some such basis as that that a mere nominal offer of settlement was made. Our offer of settlement was a complete settlement, as affecting the relative rights of the parties under the patent. So that it comes right down to the question in issue as to infringement. With that statement, why, the stipulation is made.

DIRECT EXAMINATION.

I am president and manager of the Crystal Laundry Company.

I first heard of the Brown patent some time during November, 1914.

I immediately, after receiving a letter from Mr. Atkins calling my attention to the fact that we were infringing on this particular patent of theirs—I called on Mr. Brown the following morning. And in his office we were discussing what kind of terms we could come to on our infringement if we had one. I told him that if he had a patent, I appreciated the fact, but I would like to see if he did have a patent, and if he had one, we

would see if we could come to some kind of understanding, whether we should go on and use it or discontinue it, or what. At that time Mr. Brown said it would be a matter he would have to refer to Mr. Atkins, his attorney.

The same day, I think in the afternoon, I called on Mr. Atkins at his office, and, after talking with him, he said that he didn't know exactly what would be the amount, but he would take it up with Mr. Brown again, and referred me back to Mr. Brown. Then I called on Mr. Brown again, and then he called in Mr. Meyer, and after a lengthy discussion one way and the other, it seemed to me that they didn't want a settlement on infringement basis, but they wanted to restrict us to the right to make a certain price on these towels; if we could come to a price that we would establish and maintain by their dictation, then they would be willing to make a price. So after we talked there quite awhile, why, Mr. Meyer and Mr. Brown both said—well, they referred back to their attorney, and we would make an appointment at such a time, we would all meet there. And I think that same day at one o'clock we met in Mr. Atkins' office. Mr. Meyer was there, but Mr. Brown was not there. And after we talked about it quite a bit again, I told them that I would not consent to any such proposition that would allow them to dictate the price that we should furnish these towels for, and if that was the only settlement, it would be out of the question; that we would discontinue the use of it if they had a patent. At that time I didn't know if they had a patent or not. And I told them that I would make an offer of an amount,

and if that was satisfactory, providing their patent was right, we would settle that way. Otherwise I would take it up and consult an attorney, and see whether we had any rights or not, or whether there was a patent.

The following day I consulted attorney T. J. Geisler, who sent to Washington to get the record of the case.

After we had gotten the record and looked it over in consultation with our attorney, I made a reasonable offer, that is, what I thought was better than to have any litigation over it. I made an offer to the Brown-Meyer people of \$100, and at that time they wouldn't consider it. They said they wanted \$300, and a restriction on the price; that is, they wanted to say towels should be furnished at a certain price. And I told them that, under those conditions, we would discontinue using the part of the patent that they claimed was an infringement; and we did so at that time.

The profit the Crystal Laundry Company made in using this device similar to the Brown patent from November 3d to December 1, 1914, was about \$15.07.

I made a statement of that to the other parties.

I authorized our attorney to offer \$50, but it was not accepted.

I afterwards had a meeting with Mr. Brown, Mr. Meyer, Mr. Burg and myself, at Commercial Club building. There was quite a lengthy discussion relative to whether or not we would give them the rights to maintain a price on these particular towels; and after spend-

ing considerable time talking one way and the other, Mr. Brown said, "Well, we will make you a proposition." He says, "There is three of you. There is the Palace Laundry that has a rack, and there is Broadway Towel Supply Company, and yourself; and we will make you a proposition of \$250 for the three. That will cover this infringement." Mr. Bechtel not being present, we suggested that if he would give us a reasonable amount of time, we would take it up with Mr. Bechtel, and if that was satisfactory, he would hear from us later, within 10 days, something to that effect; but this suit was commenced before we saw Mr. Bechtel.

In offering the \$100, I didn't consider that it was worth \$100, but, as we were more or less busy, I didn't care to have any trouble over it. I didn't want any time wasted over it; and I merely offered \$100, because I thought it was worth more to me than to have any trouble. Later, after I had consulted an attorney in the matter, and been to some expense, I made the offer of \$50. That is more than what our profits showed.

I gave our towel supply department instructions to use the chain connected to the basket and not connected to the bottom of the shelf there.

In giving that instruction, I had in mind the Reid patent, which had been shown to us, their chains were assembled that way.

CROSS EXAMINATION.

I made this change under the advisement that that was the infringement; that it should not be connected to the bottom of that post.

At the time that the negotiation for a settlement was in progress, we had somewhere between 80 and 100.

Q. Do you know how many you have installed today?

A. Probably 150; maybe 175. Now, you mean similar to this device?

Q. Yes.

A. I have less of them now than I had then.

By detaching the end of the chain, I mean not fastening it to the same lock that locks that what you call, or what the patent described there as, that assembling member. We merely fasten it to something underneath that, like a basket, or even the wall, and it gives us the same effect as it does fastened to your lock.

I made no change in the device except to fasten the loose end of the chain to the basket.

Our device never was exactly the same as the Brown device. We discontinued making the fastening to the lock, and we used the same device in every other respect as we had used it before. If we took the basket off that chain, we could still use it just as we did in the first instance, that is, if we put back the link in the lock.

J. A. CLANCY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a resident of Portland, and I have charge of the deliveries for the Crystal Laundry Company.

I first heard of the Brown patent during the month of November, about November 3d, 1914.

We were notified about the patent, and we consulted Mr. Geisler, and he took the matter under advisement, and told us afterwards to change our device so it would not infringe on the Brown-Meyer patent; so we changed the device to the bottom of the basket.

I kept account of the work done during the period from November 3 to December 1, 1914. The figures of Mr. Allen are correct as to what the profit would amount to.

I made the change as Mr. Allen explained here.

After that change was made, I visited these buildings and places where these devices were established about once a week, and noticed particularly that the bottom end of the chain was disconnected from the bottom end of the crooked head post. All the chains were connected with the bottom of the basket.

In supplying the customers with a towel-rack, none of them required any particular device.

We used this device here.

We adopted this device because we had to have some device to comply with the law that went into effect on July 28, 1914; so we took the easiest method, and made the simplest device, as you see that our device is not an exact copy of the other device.

Before that we used a device without a chain; we had the rod device, and fastened it to the wall, and the towels hung on the rod.

During the middle part of the summer—I couldn't say, either June or July, 1914—we connected a chain to it. I had no knowledge at that time about the Brown device at all.

CROSS EXAMINATION.

We changed from the solid rod to the chain because it was more efficient.

I first heard of the plaintiff's patent on November 3, 1914.

On that day our firm received a letter from the Brown-Meyer Company, or your office, that they had received their patent on November 3d.

This notice came through our office.

RALPH P. MEYER, recalled for the plaintiff.

DIRECT EXAMINATION.

I heard the testimony of Mr. Allen, that, in the negotiation made respecting this patent, the Brown-Meyer Company attempted to dictate a rate on towels; that is not a fact, according to my recollection.

No such attempt was made.

No rate proposed or discussed, though we talked about the rate that individual towels ought to have; but there was no attempt to dictate a rate in the settlement; absolutely none.

AMOS BURG, recalled for the defendants.

DIRECT EXAMINATION.

I was present at this meeting or conference between Mr. Allen, Mr. Brown and Mr. Meyer.

I remember hearing the discussion of a rate; we discussed it somewhat from a business standpoint. Mr. Brown or Mr. Meyer said something about, as I understood, that they wanted a certain price providing that they would let us use those towel-racks.

CROSS EXAMINATION.

It was a certain price for the use of the towels.

Although I couldn't say just what the conversation that we did have.

I mean to state that a rate agreement on towels was made a condition of making a settlement with us on this infringement question.

I understood it that way.

C. F. BROWN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am C. F. Brown, of the Brown-Meyer Company.

I heard the testimony given by Mr. Allen and Mr. Burg in regard to a conference at which I was present. To my recollection absolutely no towel rate was insisted upon as a condition precedent to making a settlement of this infringement.

CROSS EXAMINATION.

Nothing was said about the proper charges to make for towels.

Only as the laundrymen gathered together there, each one in his own interest, suggested what the price ought to be for a fair profit.

I couldn't say who made the suggestion as to what the rate should be. I don't know that there was any suggestion made as to what the rate should be. I don't remember whether there was or was not such a suggestion made.

REDIRECT EXAMINATION.

We did not demand any towel rate in order to settle.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

STIPULATION.

It is hereby stipulated between the parties:

That the time for filing of transcript of record on this appeal be further extended thirty (30) days from date.

That the transcript on appeal shall include:

Bill of Complaint;

Answer;

Opinion of Trial Court;

Interlocutory decree of January 31, 1916;

Order of reference to Master;

Motion to punish defendants for contempt, and affidavits in support of same;

Defendants' answer on contempt proceedings;

Supplemental decree of March 21, 1916;

Defendants' motion to vacate supplemental decree, and papers in support of same;

Defendants' motion for leave to file supplemental answer;

Petition for same and proposed supplemental answer;

Order refusing defendants' permission to file supplemental answer;

Order refusing to vacate supplemental decree;
Petition for appeal, and order of allowance;
Bond on appeal;
Assignment of errors;
Citation on appeal;
Condensed statement of the evidence;
Stipulation of the parties dated October 19, 1916;
Order of Court entered thereon October 19, 1916.

That the attached condensed statement of the evidence may be approved by the Court as true, complete and properly prepared, and that the same be included as a part of said transcript of record. That in considering the evidence in this cause, it is to be noted that the same in part covers the acts of other independent parties, namely: The Broadway Towel Supply Company and Amos Burg, who were charged with the infringement of said patent in a separate suit, but the two causes were tried jointly as a mere matter of convenience.

That copies of all patents and writings introduced in evidence by either party shall be furnished to the Clerk and included in the printed copy of said transcript of record, and that the original models introduced as exhibits by either party at the trial of this cause shall be sent by the Clerk to the Marshal of the Circuit Court of Appeals of the Ninth Circuit at San Francisco.

Dated October 19, 1916.

JOSEPH L. ATKINS,
Attorney for Plaintiff.

T. J. GEISLER,
Attorney for Defendants.

On approval of the foregoing stipulation of the parties, it is hereby

ORDERED that the time for filing the transcript of record in this appeal be further extended thirty (30) days from October 19, 1916, and that the attached condensed statement of the evidence taken on the hearing of this cause be and the same is hereby approved of as true, complete and properly prepared.

That copies of all patents and writings introduced in evidence by either party shall be furnished to the Clerk and included in the printed copy of said transcript of record, and that the original models introduced as exhibits by either party at the trial of this cause shall be sent by the Clerk to the Marshal of the Circuit Court of Appeals of the Ninth Circuit at San Francisco.

Dated October 19, 1916.

CHAS. E. WOLVERTON,
Judge.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title)

CITATION ON APPEAL.

United States of America,
District of Oregon,—ss.

To Brown-Meyer Company, a Corporation, Greeting:

WHEREAS, Crystal Laundry Company and Percy G. Allen, the above-named defendants, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law.

YOU ARE, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said district, this 29th day of July, 1916.

CHARLES E. WOLVERTON, Judge.

(Title)

No. 6718.

It is hereby stipulated that the foregoing printed transcript is a true copy of the entire record in the above entitled case on appeal and that the same may be certified to as such by the Clerk of said District Court without comparison.

It is further stipulated that printed copies of all patents and writings introduced in evidence by either party, but not placed in the printed transcript, may be furnished to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and by him placed in the "Appendix of Documentary Evidence" in the printed copies of the transcript; and that the original models introduced as exhibits by either party at the trial of this cause in the District Court shall be sent by the Clerk of the latter Court to the Marshal of said Circuit Court of Appeals pursuant to rule 34 of the latter Court.

That the time to file said certified record and docket the same with the Clerk of said Court of Appeals was duly extended until April 10, 1917.

Dated March 31, 1917.

JOSEPH L. ATKINS,

Of Counsel for Plaintiff-Appellee.

T. J. GEISLER,

Of Counsel for Defendants-Appellants.

United States of America,
District of Oregon—ss.

No. 6718.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed transcript of record on appeal in the case in which the Brown-Meyer Company, a corporation, is plaintiff and appellee and the Crystal Laundry Company, a corporation, and Percy C. Allen are defendants and appellants, is a true and complete transcript of the record and proceedings had in said cause in said Court. This certificate is made pursuant to the stipulation of the parties filed in said cause, *without comparison thereof with the original record.*

In Testimony Whereof I have hereunto set my hand and affixed the Seal of said Court at Portland, in said District, this ³⁰~~31~~ day of ^{April}~~March~~, 1917.

G. H. MARSH,

Seal

Clerk.

APPENDIX OF DOCUMENTARY EVIDENCE

Containing as Follows:

Patent in suit granted to Charles F. Brown, November 3, 1914, No. 1,115,895, on application filed August 13, 1913, being Plaintiff's Exhibit A See Record, page 66

File Wrapper of said Patent, being Defendants' Exhibit 2 See Record, page 72

The Patents cited in said File Wrapper, viz:

Patent to N. S. Baldwin and E. S. Goodwin, April 7, 1896, No. 557,754, Defendants' Exhibit 3 See Record, Page 72

Patent to J. G. Cooner, December 29, 1908, No. 908,076, Defendants' Exhibit 4 See Record, page 72

Patent to Jacques Rousso, April 9, 1912, No. 42,398, Defendants' Exhibit 5 See Record, page 72

Patent to L. Straub, September 17, 1912, No. 1,038,984, Defendants' Exhibit 9 See Record, page 73

Patent to T. K. Taylor, February 4, 1913, No. 1,052,292, Defendants' Exhibit 6 See Record, page 72

Patent to Guy Reid, July 15, 1913, No. 1,067,622, Defendants' Exhibit 7 See Record, page 73

Patent to T. Heins and E. R. Galland, November 11, 1913, No. 1,078,501, Defendants' Exhibit 8 See Record, page 73

Here follows Official FILING RECEIPT.

Dated August 13 1913. Serial No. 784,544.

FILE WRAPPER

* *

Patent issued to

CHARLES F. BROWN

November 3, 1914. No. 1,115,895.

TOWEL HOLDERS

Application filed August 13, 1913, Serial No. 784,-
544.

Here follows PETITION in due form.

Here follows descriptive part of specification which
was not changed by amendment, and therefore is shown
by the same part printed in the patent, copy of which is
hereto attached.

The claims as originally appearing in the specifica-
tion, the actions of the Patent Office, and the amend-
ments making the claims as printed in said patent were
as follows:

Claims in re patent of Charles F. Brown No. 1115895

1. ~~In a towel holder or the like, the combination~~
~~with a ^{movable} supporting member, of a flexible towel retain-~~
~~ing member secured in its entirety thereto.~~

2. ~~In a towel holder or the like, the combination~~
~~of a ^{movable} supporting member, of a flexible towel retaining~~
~~member, and means for detachably securing the latter~~
~~in its entirety to the former.~~

1. ~~3.~~ In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member cooperative therewith for the purpose specified, and means for securing both ends of said retaining member to the assembling member.

2. ~~4.~~ In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member cooperative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together.

~~5. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member cooperative with said assembling member.~~

~~6. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member carried by said assembling member cooperatively with said supporting member.~~

~~7. In a towel holder or the like, the combination with a supporting member provided with a socket, of an assembling member mounted in said socket, and a retaining member detachably secured to the assembling member.~~

~~8. In a towel holder or the like, the combination with a supporting member provided with a socket, of~~

~~an assembling member mounted therein, a retaining member carried by the assembling member, and common means for securing the retaining member to the assembling member and the assembling member to the supporting member.~~

3 9. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detachably securing the free end of the retaining member to the socket end of the assembling member.

4 10. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detachably securing the free end of the retaining member to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

~~11. In a towel holder or the like, the combination with a supporting member, of a towel assembling member provided with a threading point, and means for operatively uniting said members, substantially for the purpose specified.~~

Witnesses:

Charles F. Brown

K. D. Fenn

Joseph L. Atkins

Here follows OATH in due form.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington Dec. 12, 1913.

Mailed “ “ “

Joseph L. Atkins,
809 Chamber of Commerce,
Portland, Oregon.

Please find below a communication from the EX-
AMINER in charge of the application of Charles F.
Brown, 784,544, filed Aug. 13, 1913, for Towel Holders.

Thomas Ewing,
Commissioner of Patents.

Claims 1, 2, 3, 5 and 6 are rejected on Reid, 1,067,-
622, July 15, 1913 (45/32).

Claims 4 and 8 are rejected on Reid, in view of
Taylor, 1,052,292, Feb. 4, 1913 (43/32).

Claim 4 is also rejected as not being warranted by
the disclosure.

Claims 9 and 10 are rejected on Reid and Taylor,
in view of Heins, 1,078,501, Nov. 11, 1913 (45/32).

Claim 11 is rejected on the above cited references
in view of Baldwin, 557,754, Apr. 7, 1896 (129/8).

Attention is directed also to Cooner, 908,076, Dec.
29, 1908 (211/17).

Walter Johnson, Examiner Div. VIII.
H. A. W.

MAIL ROOM

Feb. 24, 1914

U. S. PATENT OFFICE

U. S. PATENT OFFICE

Feb. 25, 1914

DIVISION 8, Paper No. 3

UNITED STATES PATENT OFFICE

Charles F. Brown

Towel Holder

Filed Aug. 13, 1913

Ser. No. 784,544.

Portland, Oregon, February 19, 1914.

Hon. Commissioner of Patents,

Washington, D. C.

SIR:

Responsive to official action of December 12, 1913.
Please amend as follows:

Claim 1, line 2, before "supporting" insert "movable."

Claim 2, line 2, before "supporting" insert movable."

This application was drawn in view of the references cited, and upon a device which in practice corrects the deficiencies of the subject matter of the several references.

Referring to the claims seriatim, claim 1 calls for a retaining member, to-wit, the chain 19, secured in its entirety to a supporting member or shelf 1. Reid shows no such construction, but shows a lock-case 2, and separate ring 6. Assuming that the examiner has upon a strained construction included the wall to which the

members 2 and 6 may be attached in order to constitute a supporting member, amendment of the claim has been made, although it is submitted that such a construction is inadmissible.

Claim 2 is amended in like manner and for corresponding reasons as claim 1.

Claim 3 calls for a combination in which both ends of the chain are secured to the assembling member, or member 4. Reid shows no such construction. The inclusion of the wall by construction cannot be made in respect to claim 3, because applicant's assembling member 4 corresponds in function to Reid's member 1 and 1a. There is a distinct utility in the subject matter defined in claim 3, in that it renders the entire length of the looped chain available to the user of a towel, while the reach of Reid's chain is much restricted.

In respect to claim 4, neither Reid nor Taylor shows means for detachably securing both ends of the retaining member together. Let it be noted that in applicant's construction his assembling member constitutes an elongated link of special function in the retaining member. Taylor shows and describes a duplicated rack, whereof two arms 8 are united. Taylor's part 7 corresponds to applicant's assembling member 4, and his arm 8 to applicant's retaining member. Taylor's arm 8 is not united to the part 7 of his rack except at one end, and there is no intercommunication between Taylor's arm 8, upon which one may be predicated as a continuation of the other.

The Examiner's objection that claim 4 is not warranted by the disclosure, is not made clear. If insisted upon, a more particular statement is requested, but it is believed that discriminating reconsideration will remove this objection.

In respect to claim 5, an assembling member swiveled to the supporting member is called for, and is not shown in Reid. On the contrary Reid shows a lock in Fig. 3, which prohibits rotative movement of the member 1. In Fig. 4, the locking device 2a is described as identical with that shown in Fig. 3.

The above observation applies also to claim 6.

Argument in support of claims 3 and 4 is applicable to claim 8.

The action in respect to claims 9, 10 and 11, it is submitted, is either not clear, or is clearly unwarranted. The practice of collocating a plurality of separate and distinct references to meet a distinct combination has been so often condemned, both by the courts and in patent office practice, as to require no serious consideration. A restatement of the grounds of rejection, or reversal of action is solicited.

This application is, in view of the foregoing, deemed to be in condition for allowance, and that action is accordingly solicited.

Very respectfully,
CHARLES F. BROWN,
By Joseph L. Atkins, Attorney.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington, Mar. 26, 1914.

Mailed “ “ “

Joseph L. Atkins
809 Chamber of Commerce
Portland, Ore.

Please find below a communication from the Examiner in charge of the application of Charles F. Brown, 784,544, filed Aug. 12, 1913, for Towel Holders.

THOMAS EWING,
Commissioner of Patents.

Amendment of Feb. 24, 1913, is of record.

Claims 1 and 2 are rejected on Taylor, of record, or Rouso, Design 42,398, Apr. 9, 1912, in view of Reid, of record. It does not involve invention to substitute the retaining member of Reid for that of Taylor or Rouso. These claims are also objectionable as being indefinite in terms. The expression “in its entirety” does not set forth any structure.

As far as set forth in claim 3, the ends of the flexible member are secured to the retaining member only as to a convenient support. To secure the lower end of Reid's flexible member to any other convenient part of the device than that selected by the patentee does not involve invention or patentable novelty. Claim 3 is accordingly rejected.

Claim 4 is rejected either as not being warranted by the disclosure or as being met by Reid. If the ap-

plicant shows means for connecting the ends of the flexible member, Reid does also.

Claims 5, 6, 7 and 8 and 11 are rejected as reading directly on Heins, of record.

Claims 9 and 10 stand rejected on Heins and Reid, of record. It does not apparently involve invention to substitute the retaining member of Reid for that of Heins. These claims are also rejected as being inaccurate. The retaining member does not appear to be flexibly secured to the assembling member. It is pivotally secured.

H. LEWIS,
Examiner.

H.A.W.

Mail Room

Division 8, Paper No. 5

JUL 28 1914

U. S. PATENT OFFICE

Room 131

Charles F. Brown

Serial No. 784,544

Filed August 13, 1913

Towel Holders.

Portland, Oregon, July 23, 1914.

Hon. Commissioner of Patents,

Washington, D. C.

SIR:

Response to official letter of March 22.

Under date of February 19, 1914, counsel for applicant submitted a paper by way of amendment, in which painstaking effort was made, by compliance with rule 68, to assist in the disposition of this case.

It is with all due respect submitted that the reply of March 26th is not reciprocal either in matter or form. In almost every instance, although the claims are substantially the same, the grounds of rejection set up in Paper No. 2 are in paper No. 4 shifted, without any explanation whatever. Such action is not calculated to promote or even to admit of intelligent response, and is not believed to constitute a proper compliance with the requirements of the rules of practice. The nature of the last official action taken in this case is fairly summarized in the last two sentences thereof, namely: "The retaining member does not appear to be flexibly secured to the assembling member. It is pivotally secured." It ap-

pears to be unnecessary to submit argument that a pivotal connection is a flexible connection, inasmuch as it must be apparent to anyone having the least skill in the art or any mechanical art, that any possible connection between a chain and a rigid member is a flexible connection.

With respect to claims 1 and 2, which in paper No. 2 were rejected on Reid, and are in paper No. 4 rejected on Taylor or Rousso, it is submitted, as it was formerly in Paper No. 3, that Reid does not show the construction claimed. Neither Taylor nor Rousso shows anything approximating the construction, nor a construction which is interchangeable one with the other.

It has been repeatedly held that the charge of infringement cannot be escaped by allegation or proofs that parts of a combination are to be separately found in different prior patents.

Bates vs. Coe, 98 U. S. 31-50.

Parks vs. Booth, 102 U. S. 96.

It is scarcely necessary to argue that grounds of rejection of a claim and a defense against infringement are in all respects identical. It would appear that grounds of rejection urged against claims 1 and 2 are made in disregard of the authorities cited, which reflect, it is submitted, the law on the subject beyond controversy.

In respect to claim 3, if the examiner's argument is understood, it means that Reid's chain has its ends connected, because they are both attached to a wall. This

appears to exclude arbitrarily that which constitutes the very gist, in part, of applicant's invention.

It is error for the examiner to say, "The ends of the flexible member are secured to the retaining member only as to a convenient support." On the contrary, the combination described in Figure 3 defines a special construction and a distinct utility. It is this, in the Reid device, as shown partly in Figure 2, each individual towel must be used in close proximity to the other towels, clean and soiled, upon the holder. Of course, it may be said that this situation may be relieved by increase of length of chain. But this does not meet the situation. To increase the length of chain beyond certain limits is impracticable, and would tend to defeat the purpose of the device, in the kinking of the chain, for example. Applicant has devised means for obtaining the maximum availability of each individual towel in use without impairment of the certainty of operation of the device.

The grounds of rejection of claim 4 are not understood, unless they be substantially the same as those urged against claim 3. In that event they are submitted to be, equally with claim 3, inapt. A more specific statement of grounds of rejection, in view of applicant's argument in paper No. 3, is requested.

In respect to claims 5, 6, 7, 8 and 11, it is observed that although in the last official letter they are rejected on Heins of record for the first time, having been previously rejected upon other references, they are now said to read directly on Heins. This allegation is traversed.

Claim 5 covers in combination the following elements:

1. A supporting member.
2. An assembling member swiveled to the supporting member.
3. A retaining member co-operative with said assembling member.

Heins shows two supports, a tube 4 for the upper support, and a rod 5 for the lower. It is supposed that the terms employed in the claim are understood to be selected for the purposes of distinction only. Nevertheless, it is submitted that the principle and functions of their subject matter are clearly intelligible, and are clearly distinguishable from Heins. The examiner, if he persists in previous action, is requested to indicate what he regards in Heins as a supporting member, what as an assembling member, and what as a retaining member.

The rejection of the remaining claims of the group last named is believed to be made upon reasons that are not clearer than the rejection of claim 5, and further explanation or withdrawal of the rejection is solicited.

The grounds of rejection of claims 9 and 10 is not understood. There is no relationship between Heins and Reid of record. If it were conceded that as between Reid and Heins there is the difference only of a flexible and a rigid retaining member, yet, so far as applicant is concerned, there is no such close similarity.

In respect to Claims 9 and 10, not only does the argument previously submitted in support of claim 3 apply, but also additional means are comprehended in the claim for securing the flexible member a maximum limit of movement.

So far as counsel for applicant can discover, this application is in condition for allowance, and action accordingly is solicited.

Very respectfully,

CHARLES F. BROWN,

By Joseph L. Atkins, his Attorney.

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington, Aug. 24, 1914

Mailed “ “ “

J. L. Atkins

809 Chamber of Commerce

Portland, Ore.

Please find below a communication from the Examiner in charge of the application of Charles F. Brown 784,544, filed Aug. 13, 1913, for Towel Holders.

THOMAS EWING,
Commissioner of Patents.

Responsive to letter of July 28, 1914.

Claims 9 and 10 are informal as of record.

Claims 1, 2, 5, 6, 7 and 11 stand rejected on the references and for the reasons set forth in the last office action.

Heins appears to show the relation of elements called for by claims 5, 6 and 7. He shows a support 1, provided with a socketed member 2, in which is swiveled an assembling member 4, to which is detachably secured a retaining member 5.

Claim 8 is rejected on.

Straub, 1,038,984, Sept. 17, 1912 (45/32).

As at present advised, claims 3, 4, 9 and 10 are allowable subject to the objections of record.

GEO. P. TUCKER,
Examiner.

H.A.W.

Mail Room
Sept. 8, 1914
U. S. Patent Office
Room 131

Division 8, Paper No. 7
Sept. 9, 1914
U. S. Patent Office

UNITED STATES PATENT OFFICE.

Charles F. Brown.
Serial No. 784,544
Filed August 13, 1913
Towel Holders.

Portland, Oregon, September 3, 1914.

Hon. Commissioner of Patents,
Washington, D. C.
Sir:

Response to official letter of August 24, 1914.

The alleged informality of claims 9 and 10, appears to be, that the retaining member is not flexibly secured to the assembling member. This, as was observed in the last action, appears to be an absurdity. Its reiteration suggests that there is a mistake made somewhere, and the indulgence of the examiner is therefore requested. The assembling member is the member 4 clearly shown in Fig. IV. The retaining member is the member 19 on the same figure. They are flexibly united at 18, and are not pivotally secured together.

It is believed that there is now no room for doubt, that the allegation of informality will be withdrawn.

In respect to the action on the merits, applicant denies the pertinency of the references to claims 1, 2, 5, 6, 7,

8 and 11. He is, however, satisfied to accept allowance upon claims 3, 4, 9 and 10, subject to such construction as they are entitled to receive in view of the prior state of the art and without restriction in consequence of the imputed disclaimer upon his part.

He, therefore, without prejudice to his just rights in the premises, authorizes and requests erasure of all the claims, except claims 3, 4, 9 and 10. With respect to those claims, it is requested that their numerals be changed to 1, 2, 3 and 4, respectively, and that the application be passed to issue.

Very respectfully,

CHARLES F. BROWN,
By Joseph L. Atkins, Attorney.

Here follows Official NOTICE OF ALLOW-
ANCE in due form, dated September 21, 1914.

Here follows Official Receipt of final fee in due form
giving date patent will issue as Nov. 3, 1914.

*In the District Court of the United States for the
District of Oregon.*

No. 6718.

(Title.)

IT IS HEREBY STIPULATED AND CER-
TIFIED that the foregoing is a full, true and complete
copy of the file wrapper in the application for patent of
Charles F. Brown, filed August 13, 1913, Serial No.
784,544, series of 1900, for improvement in Towel Hold-
er, such application having been allowed September 21,
1914, and letters patent thereon being issued November
3, 1914, No. 1,115,895, and that this file wrapper may
be introduced in evidence by either party to the same
effect as if the same had been certified by the United
States Patent Office.

Dated, Portland, Oregon, November 18, 1915.

JOSEPH L. ATKINS,
Solicitor for Plaintiff.

T. J. GEISLER,
Solicitor for Defendants.

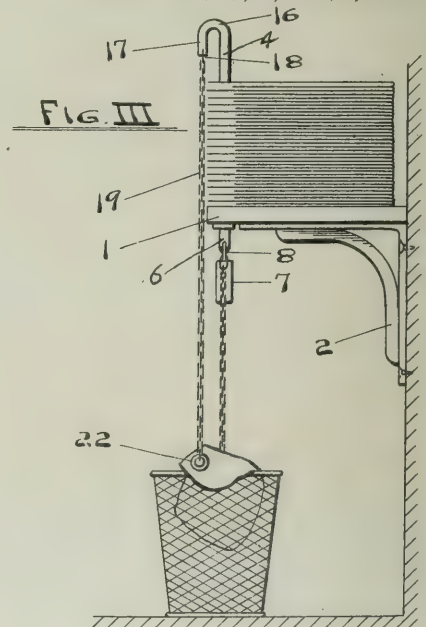
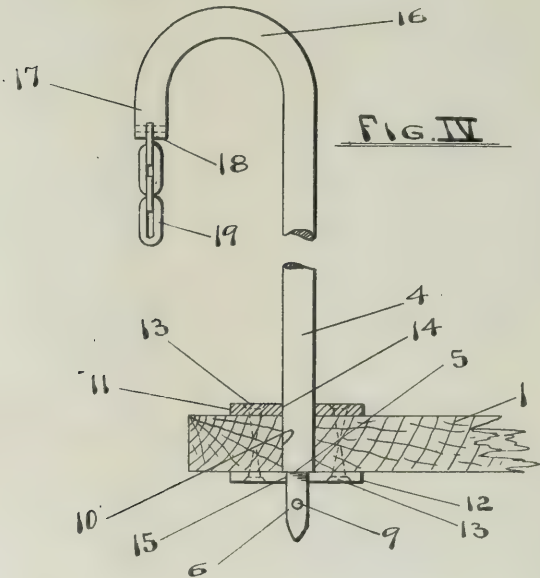
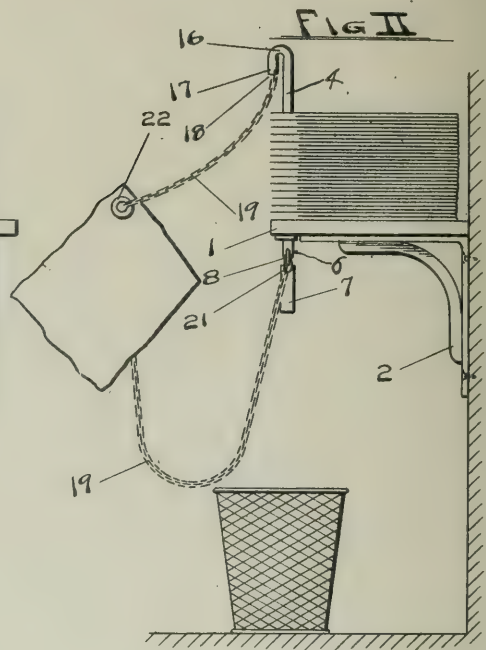
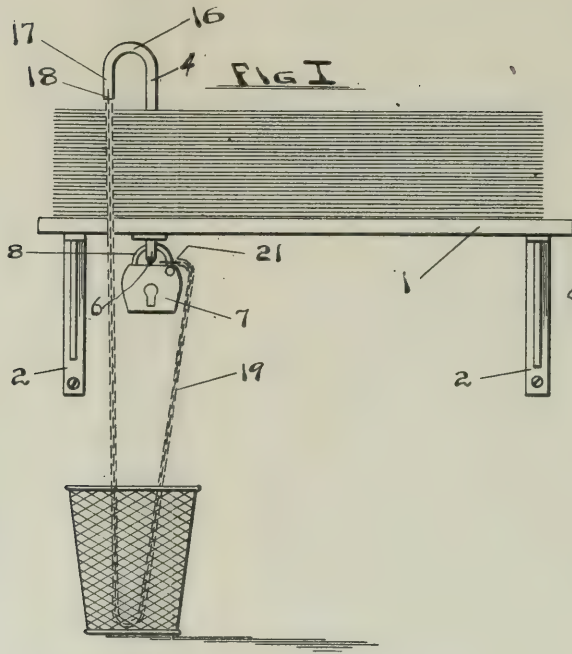
APPELLEE'S (PLAINTIFF'S) EXHIBIT "A"

Patent to C. F. Brown, Nov. 3, 1914, No. 1,115,895.

C. F. BROWN.
TOWEL HOLDER.
APPLICATION FILED AUG. 13, 1913.

1,115,895.

Patented Nov. 3, 1914.



WITNESSES:
H. D. Fern
E. M. Hester

INVENTOR:
Charles F. Brown,
BY
Joseph H. Hester
ATTORNEY.

UNITED STATES PATENT OFFICE.

CHARLES F. BROWN, OF PORTLAND, OREGON, ASSIGNOR TO BROWN-MEYER COMPANY,
OF PORTLAND, OREGON, A CORPORATION OF OREGON.

TOWEL-HOLDER.

1,115,895.

Specification of Letters Patent.

Patented Nov. 3, 1914.

Application filed August 13, 1913. Serial No. 784,544.

To all whom it may concern:

Be it known that I, CHARLES F. BROWN, a citizen of the United States of America, residing at Portland, in the county of Multnomah, in the State of Oregon, have invented certain new and useful Improvements in Towel-Holders, of which the following is a specification, reference being had to the accompanying drawing.

My invention relates to towel holders, and has for its object the production of a device for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry until such time as they are required, one by one, for use.

A further object of the invention is to provide means for conveniently withdrawing the towels one by one from the pile, for facilitating the manipulation of it while in use, and for securing it against accidental misplacement or intentional and unauthorized removal after use.

What constitutes my invention will be hereinafter specified in detail and succinctly set forth in the appended claims.

In the accompanying drawing: Figure I is a front elevation of my invention complete in its present preferred form of embodiment. Fig. II is an end elevation of the same, looking toward that end of the device upon which the clean towels are assembled, and showing one of the towels removed from the pile of clean towels as in use. Fig. III is a view similar to Fig. II showing the towel as illustrated in use in Fig. II dropped to that position in which it is discarded after use, wherein the used towels accumulate and are secured, until the supply of clean towels is exhausted or until so many of them have been used as may be required in service before replenishment of the clean supply. Fig. IV is a vertical sectional view illustrating the clean towel assembling member in place on an enlarged scale.

Referring to the numerals on the drawing, 1 indicates a horizontal supporting member, or, as illustrated, a shelf, which, being of any suitable shape and dimensions and made of any preferred material, is adapted to be held in any desired position, as against any vertical wall, upon brackets

of example only, and is intended to represent any suitable instrumentality for the function required of it, whether it be a simple shelf or a part of a cabinet or other device. The function of the shelf 1 is to carry a pile of clean, preferably folded, towels which may be of any preferred size, and whose size will, of course, determine the dimensions of the shelf 1.

In combination with the shelf 1, and for securing the towels in assemblage thereupon, I prefer to employ an assembling member 4, which I prefer also to swivel and detachably secure to the shelf 1. For this purpose, the lower end of the member 4 may be reduced to form a shoulder 5, the reduced end 6 extending below and clear of the shelf 1 to accommodate means for detachably securing the member 4 in place. Such means may consist, as shown, of a padlock 7, whose shackle 8 passes through an aperture 9 provided for its free passage through the reduced end 6 below the shelf 1.

For insuring a stable support for the assembling member 4 rotatably upon the shelf 1, I prefer to provide a suitable socket upon the shelf. This socket may consist of an aperture or bore 10 formed in the material of which the shelf 1 is composed so as to snugly fit about the assembling member, whose shape, as well as that of the conforming socket, is preferably cylindrical. To lend durability to the bearing parts of the socket, the bore 10 may be reinforced by a top plate 11 and a bottom plate 12, secured respectively as by screws 13 to opposite sides of the shelf 1. The top plate is penetrated by an aperture 14 made to snugly fit the end of the assembling member 4 while the bottom plate is provided with an aperture 15, assembled coaxially with the aperture 14 of the top member, but of smaller diameter to fit the reduced end 6 of the assembling member. By this construction the assembling member is rotatably secured in the socket provided for it, and is supported therein by an engagement between the shoulder 5 with the circum-scribing wall of the aperture 15 in the bottom plate. The aperture 9 in the reduced end of the assembling member is located in such close juxtaposition to the lower side of the bottom plate as to render the shackle of the padlock 7 when in place a confining member that will serve to secure the assem-

2. The shelf illustrated is presented by way

bling member rotatably in the upright position upon the shelf 1.

The member 4 extends preferably in a direct line above its supporting socket for a distance proportionate to the number and character of the towels that are, in service, assembled upon it, and it preferably terminates at its free end in a curved neck 16, terminating in a depending end 17. By reason of the function of the assembling member, as will be hereinafter made more fully to appear, it is desirable that the neck of the assembling member should terminate at a distance above the shelf 1 substantially equal to or a little greater than the thickness of the maximum towel-supply upon the shelf 1 about the member 4.

In connection with the assembling member and its shelf I provide means for confining the towels during use and after use by a towel retaining member whose function being that of securing them against loss or unauthorized abstraction I prefer not only to flexibly unite, as indicated at 18, to the depending end 17 of the neck 16 of the assembling member, but also to constitute it of flexible material or substantially in the form of a chain, as illustrated. The flexible member or chain 19 is preferably permanently united to the depending end 17 of the neck, while its free end is removably secured to the other end of the member 4, preferably by the aid of an eyelet 21 through which the shackle 8 of the padlock is passed when the padlock is secured in place upon the lower end of the member 4 as in the manner previously specified.

Each of the towels above referred to being, as has been specified, of any preferred material and dimensions, is provided, preferably near one corner, with a gromet 22, (see Fig. II) which adapts it to slide freely upon the member 4 but with amply secure attachment thereto.

In practice, each shelf, wherever installed, is provided with its assembling member and means for securing it in place, and is designed to afford an ample supply of towels under approved sanitary conditions. Such conditions require that an uninterrupted supply of clean towels shall be provided to meet the demands in service of each installation. In making provision to that end, the means for supplying each device with fresh supplies of towels must take into consideration numerous conditions. For example, inasmuch as a supply attendant, in order to cover economically a territory assigned to him, must carry as little weight as possible, I provide by my invention for dispensing, in this connection, with all weight except that of the towels themselves. But it is also necessary to economize time in making the distribution of clean towels and the collection

of soiled ones. My invention is in all respects, and more particularly in respect to the shape of the assembling member and the relation of its parts to the whole, adapted to facilitate and to effect in the shortest space of time the stringing of the towels upon the assembling member through their respective gromets; the stripping of the soiled towels from the retaining member of the device; and the adjusting and securing of the several parts in operative position. In this connection it may be observed that while the neck 16 and its depending end 17 serve to confine the clean towels upon the shelf against accidental displacement, the termination of said depending end at a distance above the shelf equal to or greater than the thickness of the maximum pile of towels thereon renders it practicable and convenient to insert the assembling member through the gromet of the towels and secure it in place with that minimum degree of attention which the manipulation of a simple straight rod would entail.

The rigidity of the assembling member, which is preferably made a feature thereof, serves to secure the clean towels in place upon the shelf, while the flexibility of the retaining member, constituting as it does in fact a continuous extension of the assembling member, provides for the widest latitude of manipulation of the individual towels in use. It may be further observed that to facilitate and expedite towel service supply in connection with my towel holder, it is contemplated, in practice, that the towels will be assembled and tied in bundles at the laundry or source of supply, with all the gromets of each bundle in register. In consequence, opportunity for crumpling or soiling of the towels in transit is minimized, and all that remains for the attendant to do, in supplying a bundle to the holder after removal of the soiled towels, is to lay the fresh bundle on the shelf 1, then set and secure the assembling member 4 in place upon the shelf, after first inserting it through the aligned gromets of the bundle. Toward this end, I prefer to finish the end 6 of the member 4 with a threading point, rounded or conical, as shown clearly in Fig. IV.

I claim:

1. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member coöperative therewith for the purpose specified, and means for securing both ends of said retaining member to the assembling member.
2. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member,

a flexible retaining member coöperative therewith for the purpose specified, and means for detachably securing both ends of said retaining member together.

5 3. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detach-
10 ably securing the free end of the retaining member to the socket end of the assembling member.

4. In a towel holder or the like, the com-

bination with a supporting member pro- 15
vided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and means for detach- 20
ably securing the free end of the retaining member to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

CHARLES F. BROWN.

Witnesses:

K. D. FENN,
JOSEPH L. ATKINS.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "3"

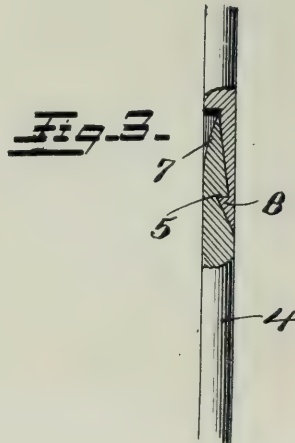
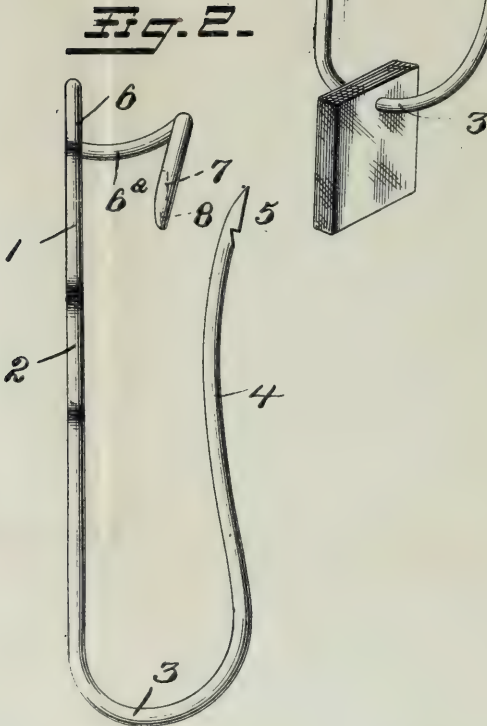
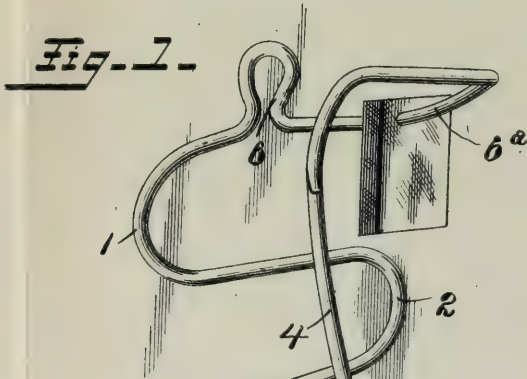
Patent to Baldwin & Goodwin, Apr. 7, 1896, No. 557,754.

(No Model.)

N. S. BALDWIN & E. S. GOODWIN.
BILL FILE.

No. 557,754.

Patented Apr. 7, 1896.



Witnesses

W. J. North
R. M. Smith

By *their* Attorneys.

Inventors

Nelson S. Baldwin
and
Ervin S. Goodwin

C. A. Snow & Co.

UNITED STATES PATENT OFFICE.

NELSON S. BALDWIN AND ERVIN S. GOODWIN, OF SPOKANE, WASHINGTON.

BILL-FILE.

SPECIFICATION forming part of Letters Patent No. 557,754, dated April 7, 1896.

Application filed June 11, 1895. Serial No. 562,447. (No model.)

To all whom it may concern:

Be it known that we, NELSON S. BALDWIN and ERVIN S. GOODWIN, citizens of the United States, residing at Spokane, in the county of Spokane and State of Washington, have invented a new and useful Bill-File, of which the following is a specification.

This invention relates to an improvement in bill-files, and has for its object to provide a simple and efficient form of device adapted to receive and hold letters, bills, or papers of any kind, and by means of which any particular bill or paper may be removed independently of and without detaching the other papers.

Other objects and advantages of the invention will appear in the course of the subjoined description.

The invention consists in a bill-file made from a single piece of wire bent in such manner as to form a supporting eye or loop, by means of which it may be attached to a wall or vertical support and having reversely-curved portions forming a supporting-back for holding the device in position upon the wall, said device also comprising a paper-holding loop, a pointed and notched file-stem, and a curved switch having its end recessed and provided with a catch for engaging the pointed notched end of the file-stem.

The invention consists also in certain features and details of construction and arrangement of parts, as hereinafter particularly described, illustrated in the drawings, and finally embodied in the claims.

In the accompanying drawings, Figure 1 is a perspective view of an improved bill-file constructed in accordance with this invention. Fig. 2 is a side elevation of the same in position to receive bills or other papers. Fig. 3 is an enlarged detail section taken through the interlocking ends of the file-stem and switch-arm.

Similar numerals of reference designate corresponding parts in the several figures of the drawings.

Referring to the accompanying drawings, the bill-file contemplated in this invention is formed from a wire blank or single piece of wire having the required stiffness and elasticity. At or near its central portion this wire blank is bent in such manner as to form

a supporting-back comprising reversely-disposed curved portions 1 and 2, the curves or bends being made of such extent vertically and horizontally as to form a supporting-back of any desired area. After forming the supporting-back one terminal is extended downwardly any desired distance, according to the capacity which it is desired to impart to the file, and thence curved gradually forward to form the hook 3, which receives and holds the bills or other papers. This terminal is then extended upwardly to form the file-stem 4, the upper extremity of which is pointed for facilitating the impaling or puncturing of the bills or papers. Slightly below the point of the file-stem a notch 5 is formed, said notch being arranged in the face of the file-stem which lies adjacent to the extremity of the other terminal, hereinafter described. The other terminal, after forming the supporting-back of the file, is first bent to form a loop or eye 6, by means of which the device may be supported upon a convenient nail projecting from the wall, and then curved forwardly and to a slight extent upwardly to form an inclined switch 6^a, adapted at certain times to receive and hold a portion of the bills or papers, as hereinafter explained. The extremity of this terminal is now bent downwardly into line with the other terminal or file-stem and is provided with a recess or socket 7, adapted to receive and snugly embrace the pointed tapering end of the file-stem. This socket in the terminal of the switch is formed with an internally-arranged spur or catch 8, which is adapted to engage the notch in the pointed end of the file-stem when the terminals are brought together, as shown in Figs. 1 and 3.

By means of the construction hereinabove described it will be apparent that the device may be rendered capable of receiving any number of bills or papers, that the same may be quickly placed thereon, and that when any particular bill or paper is wanted the bills or papers which lie in front of the same may be moved upwardly and passed over the junction between the terminals and upon the switch, after which the file-stem may be disengaged from the terminal of the switch and allowed to spring forward into its normal position, as indicated in Fig. 2, whereupon the desired bill or paper may be removed from the file.

It will be seen that when the terminals are in engagement, as indicated most clearly in Fig. 3, they will be prevented from moving vertically out of engagement, will be held in close engagement by the spring-pressure of the file-stem, and may be disengaged only by pressing the file-stem laterally in a manner that will be readily understood. The object in inclining the switch-arm as shown is to give the bills or papers a tendency to slide away from the terminal of the switch or toward the wall for preventing the same from escaping or being blown from the terminal of the switch.

It will be apparent that changes in the form, proportion, and minor details of construction may be resorted to without departing from the spirit or sacrificing any of the advantages of this invention.

Having thus described the invention, what is claimed as new, and desired to be secured by Letters Patent, is—

1. A bill-file made from a wire blank, the same being given one or more convolutions to form a supporting-back, one of the terminals being bent forward, recurved and then extended substantially parallel to and in advance of the back to form the file-stem, the opposite terminal being extended to one side,

then forwardly to form a lateral switch, the said terminal being finally brought into the proximal plane of the stem and formed to receive the point of the stem, substantially as and for the purpose described.

2. A bill-file made from a single wire blank recurved one or more times in the same plane to form a supporting-back, and also provided with an eye or loop for suspending the same, said device also comprising a forwardly-extending paper-hook, an upwardly-extending pointed terminal arranged in advance of the supporting-back, a laterally-disposed switch formed by extending the other terminal of the blank to one side of the center then forward and finally bringing its extremity into the proximal plane of the aforesaid terminal, the end of the switch having a recess or socket therein for receiving the point of the file-stem, substantially as and for the purpose described.

In testimony that we claim the foregoing as our own we have hereto affixed our signatures in the presence of two witnesses.

NELSON S. BALDWIN.
ERVIN S. GOODWIN.

Witnesses:

C. V. HAUGE,
F. H. FLANDERS.

APPELLANTS' (DEFENDANTS') EXHIBIT "4"

Patent to J. G. Cooner, December 29, 1908, No. 908,076

908,076.

Patented Dec. 29, 1908.

FIG. 3

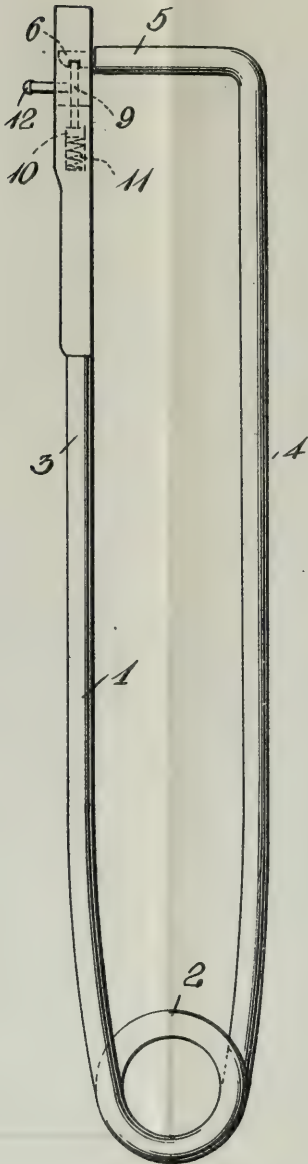


FIG. 2

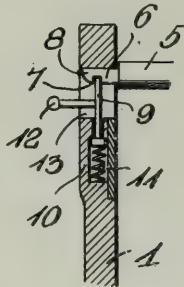


FIG. 1

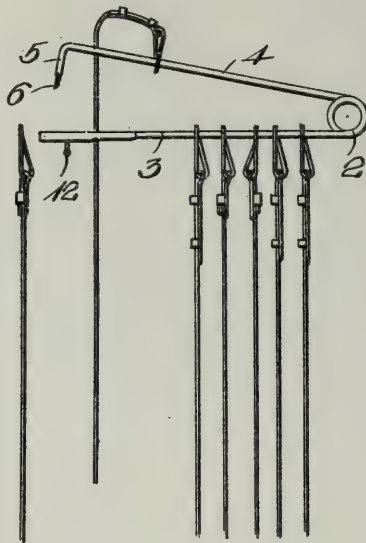
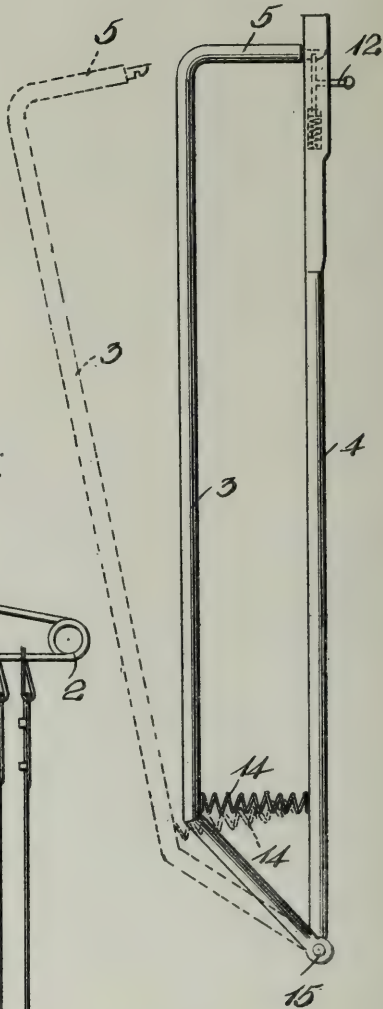


FIG. 4



Witnesses

E. J. Cooner

C. H. Giesbauer

Inventor

John G. Cooner

By

A. P. Wilson & Co

Attorneys

UNITED STATES PATENT OFFICE.

JOHN G. COONER, OF MACON, GEORGIA.

DISPLAY DEVICE.

No. 908,076.

Specification of Letters Patent.

Patented Dec. 29, 1908.

Application filed August 10, 1908. Serial No. 447,801.

To all whom it may concern:

Be it known that I, JOHN G. COONER, a citizen of the United States, residing at Macon, in the county of Bibb and State of Georgia, have invented certain new and useful Improvements in Display Devices; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention relates to devices for displaying articles of merchandise, and particularly to devices for supporting and displaying ing belts.

The object of the invention is to provide a cheap and efficient device of this character upon which the belts may be hung so as to display the same, and whereby any belt may be selected from a number of belts upon the rack without removing the others.

A further object of the invention is the provision of means for automatically locking the parallel bars of the rack together so that the belts thereon cannot be removed.

With these and other objects in view, the invention consists of certain novel features of construction, combination and arrangement of parts, as will be more fully described and particularly pointed out in the appended claim.

In the accompanying drawings, Figure 1 is a side elevation of the device with a number of belts attached thereto, and showing how a particular belt may be removed without removing the remainder on the rack, Fig. 2 is a fragmentary longitudinal section showing the locking device, Fig. 3 is an enlarged side elevation, Fig. 4 is a modified form shown in side elevation.

Referring more especially to the drawings, and particularly to Figs. 1 and 2, 1 represents a single strip of metal preferably in the form of heavy wire which is bent intermediate its length in the manner of safety pins as at 2, to form a spring loop, which connects the parallel sides 3 and 4 of the device. At one end the device is bent at right angles to form the locking extension 5, which is reduced at its extreme end as at 6, and provided with a latch receiving notch 7, and a beveled end 8, which throws the latch bar 9

out of normal so that the device is locked automatically. The latch bar 9 is carried by a casing 10, which is secured to the extreme end of the bar 3, and is impelled to normally engage the notch 7 by a spiral spring 11. A suitable operating handle 12 is formed integral upon the bar 9, and projects through the slot 13, formed in the casing 10.

In the modification shown in Fig. 3 the spring loop is dispensed with, and a spiral spring 14 is arranged between the parallel bars at the opposite end from the latch portion so as to normally spread the members as shown in dotted lines. With this type of construction two halves 3 and 4 are hinged together at their rear ends as at 15, or the material may be greatly attenuated at this point to permit free movement of the parts.

From the foregoing description, taken in connection with the accompanying drawings, the construction and operation of the invention will be readily understood without requiring a more extended explanation.

Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advantages of this invention as defined in the appended claim.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:—

A device of the class described comprising a pair of parallel members connected together at one end, one of said bars having its free end bent at right angles to its longitudinal plane and being notched, and a spring bolt carried by the other member at its free end adapted to engage said notch, said spring bolt being normally pressed toward the end of said member, the end of said spring bolt member being extended only slightly beyond the end of the notch member, whereby articles may be slipped from one member to the other.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

JOHN G. COONER.

Witnesses:

ROLAND T. MAHONE,
F. T. VINCENT.

APPELLANTS' (DEFENDANTS') EXHIBIT "5"

Patent to Jacques Rousso, April 9, 1912, No. 42,398

DESIGN.

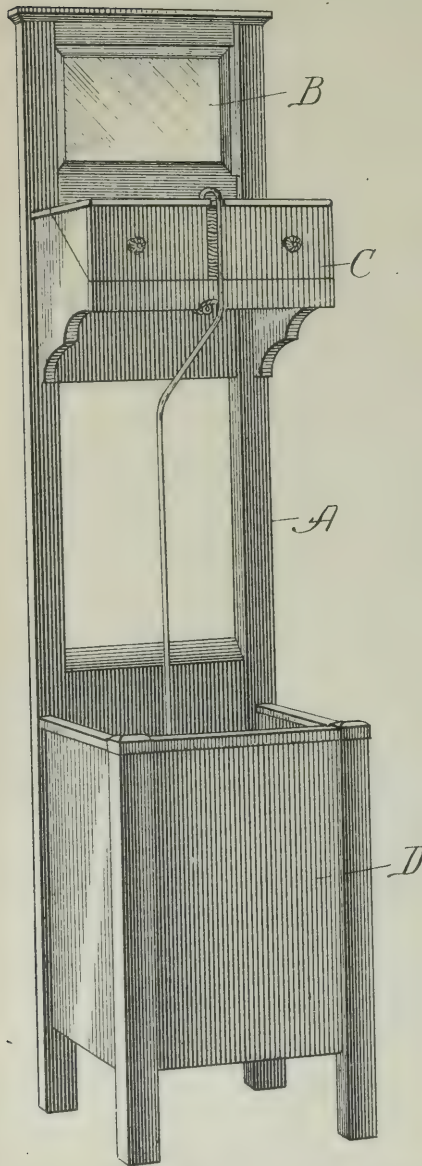
J. ROUSSO.

TOWEL CABINET.

APPLICATION FILED JAN. 5, 1912.

42,398.

Patented Apr. 9, 1912.



Witnesses:

John Enders
Henry A. Parks

Inventor:

Jacques Roussso,

by Sheridan, Wilcox, Scott & Richmond,
Attys.

UNITED STATES PATENT OFFICE.

JACQUES ROUSSO, OF CHICAGO, ILLINOIS.

DESIGN FOR A TOWEL-CABINET.

42,398.

Specification for Design.

Patented Apr. 9, 1912.

Application filed January 5, 1912. Serial No. 669,709. Term of patent 14 years.

To all whom it may concern:

Be it known that I, JACQUES ROUSSO, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new, original, and ornamental Design for a Towel-Cabinet, of which the following is a specification.

Referring to the accompanying drawing which forms a part of this specification the figure is a perspective view of a towel cabinet showing my new design.

In the particular embodiment of my design shown in the drawing the standards

A support a mirror B at their top. Below this is a box or cabinet C containing clean towels. Directly underneath the box C is a receptacle D for soiled towels.

I claim:

The ornamental design for a towel cabinet as shown.

In testimony whereof, I have subscribed my name.

JACQUES ROUSSO.

Witnesses:

SAM WOLF,
CARL A. RICHMOND.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "6"

Patent to T. K. Taylor, February 4, 1913, No. 1,052,292

T. K. TAYLOR.
TOWEL RACK.
APPLICATION FILED FEB. 10, 1912.

1,052,292.

Patented Feb. 4, 1913.

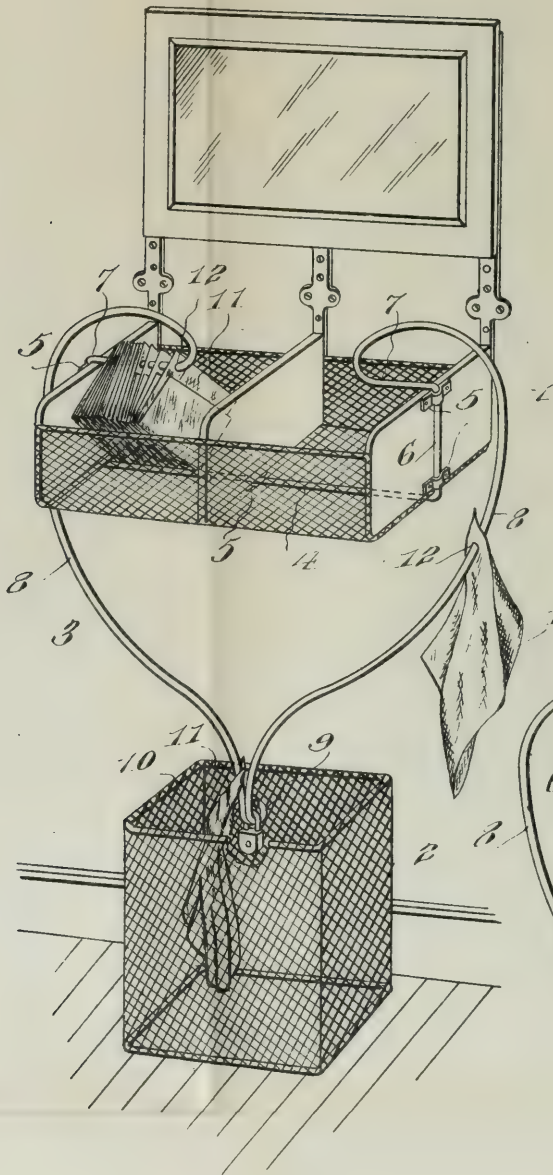


Fig. 1.

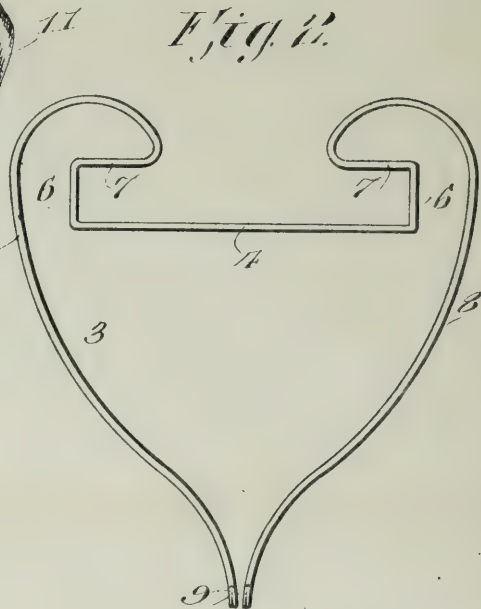


Fig. 2.

Witnesses

Frank Laughlin
Wm. Koertge

Inventor

Thomas K. Taylor,

By *Victor J. Evans*

Attorney

UNITED STATES PATENT OFFICE.

THOMAS KING TAYLOR, OF WESLEYVILLE, PENNSYLVANIA.

TOWEL-RACK.

1,052,292.

Specification of Letters Patent.

Patented Feb. 4, 1913.

Application filed February 10, 1912. Serial No. 676,747.

To all whom it may concern:

Be it known that I, THOMAS K. TAYLOR, a citizen of the United States, residing at Wesleyville, in the county of Erie and State of Pennsylvania, have invented new and useful Improvements in Towel-Racks, of which the following is a specification.

The present invention relates to improvements in towel racks, the object of the invention being to provide a rack for towels which may be connected with a cabinet, mirror or the like, and which is adapted to support a number of clean towels and to direct the same to a suitable receptacle after each of the towels has been used successively.

With the above recited object in view, and others of a similar nature, the invention resides in the novel construction, and arrangement of towel racks set forth in and falling within the scope of the appended claim.

In the drawing, Figure 1 is a perspective view of a towel rack constructed in accordance with the present invention and showing the same in applied position upon a cabinet. Fig. 2 is an elevation of the rack, the connecting members thereof being disengaged.

Referring now to the drawing in detail, the numeral 1 designates a suitable mirrored cabinet, and 2 a receptacle adapted for the reception of soiled towels which is arranged below the cabinet.

The cabinet and the receptacle may be of any desired or preferred construction, and the numeral 3 designates the improved towel rack. This rack is constructed of a single piece of wire, and comprises a straightened longitudinally extending member or portion 4 which is sustained upon the bottom of the cabinet 1, through the medium of suitable substantially U-shaped clips 5. The opposite extremities of the longitudinal member 4 are provided with vertical extensions 6, the said extensions being also secured to the cabinet through the medium of clips, similar to the clips 5. The vertical members 6 are bent to provide horizontal inturned portions 7, the same being arranged at an angle to the cabinet and to the vertical extensions 6 and these horizontal members are curved upwardly and outwardly to

provide the substantially goose neck shaped side members of the rack. The free extremity of both of the arms 8 are formed with open eyes or hook members 9, and these members are adapted to be brought into engagement with each other to close or lock the said arms 8. The arms 8 are arranged directly above the open top or mouth 10 of the receptacle 2 and it will be noted that by parting the said hooked ends 9 the towels 11, which are arranged upon the arms 8 by being provided with suitable eyes or openings 12, may be removed from the rack and deposited within the receptacle 2. If desired the hooks may be made of such a size as to permit the towels dropping by gravity within the said receptacle, the eyes, in which instance being, of course, of a greater area than the width of the hooks. The clean towels are arranged upon the horizontal portion 7 of the rack, and as each of the towels are used the one nearest the curved or goose-neck arms 9 is brought over the said arms and after being used is allowed to drop by gravity until the same is deposited upon the closed ends of the arms.

From the above description taken in connection with accompanying drawing, the simplicity of the device, the sanitary result produced thereby, as well as the many other advantages of the structure will, it is thought commend themselves to those skilled in the art to which such inventions appertain without further detailed description. It is to be understood, however, that the device is not to be limited in its connection with the cabinet and receptacle shown and described, and that the device may be employed in schools, stores, barber shops and public places.

Having thus described the invention, what I claim is:—

In a device for the purpose set forth, in combination with a divided receptacle, a towel rack, said rack being constructed of a single piece of material and embodying a longitudinal member which is arranged centrally below the cabinet, vertical members which are secured to the opposite sides of the cabinet, inturned longitudinally extending members which overlie the open top of

the compartments and which are arranged directly above the first named member, upper and outwardly curved members which have inturned sides and which terminate in
5 substantially vertical members, and the terminals of the last named members being each provided with hooks.

In testimony whereof I affix my signature in presence of two witnesses.

THOMAS KING TAYLOR.

Witnesses:

MURVIN A. PUTNAM,
MARY E. V. TAYLOR.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "7"

Patent to Guy Reid, July 15, 1913, No. 1,067,622

G. REID.
 COMBINED TOWEL HOLDER AND LOCK.
 APPLICATION FILED JULY 18, 1912.

1,067,622.

Patented July 15, 1913.

Fig. 1.

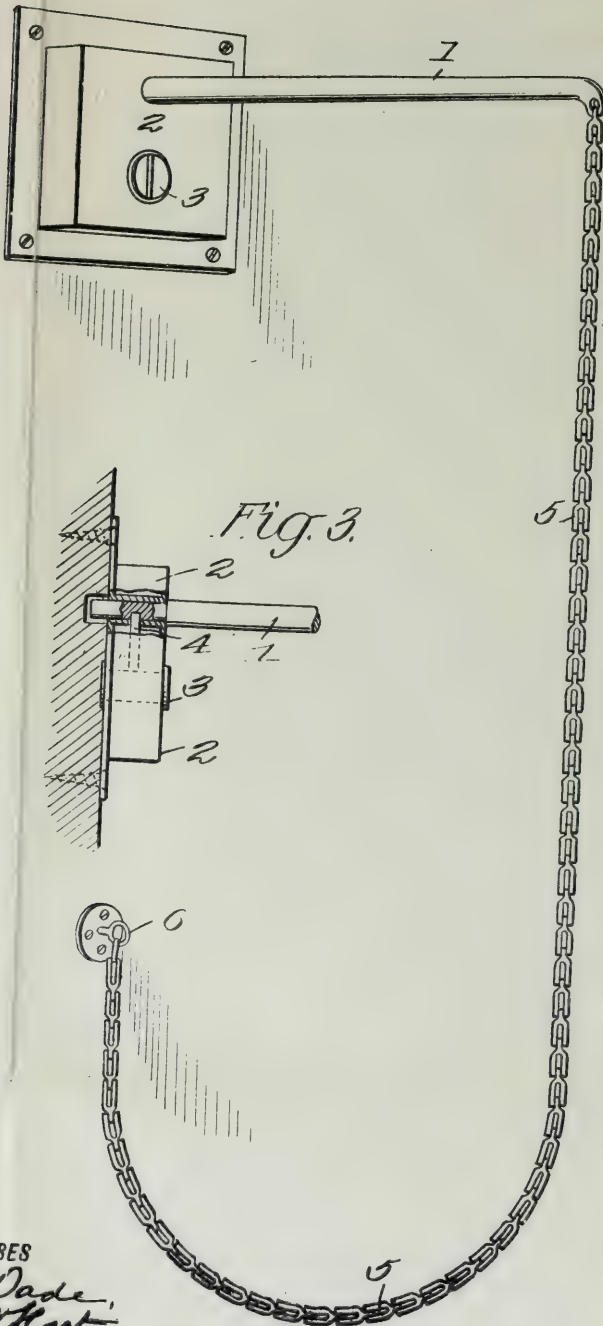


Fig. 2.

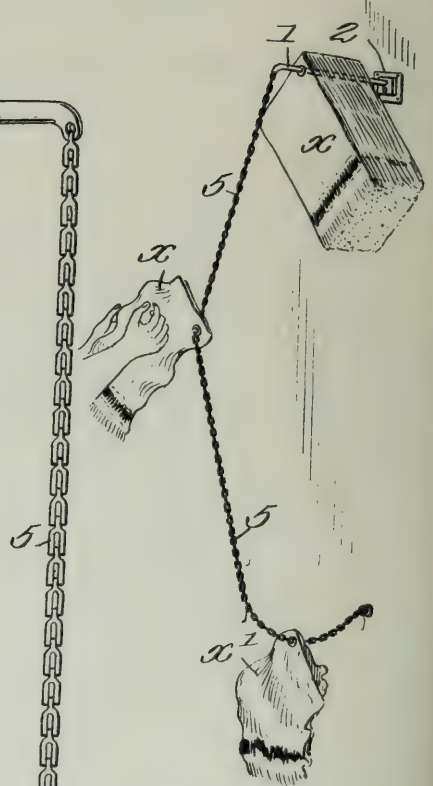


Fig. 3.

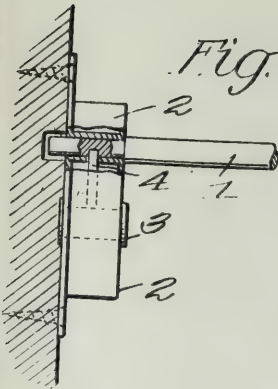
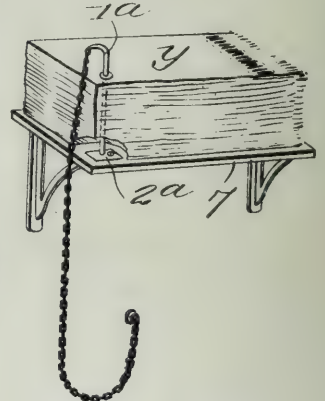


Fig. 4.



WITNESSES
 A. E. Wade,
 Amos H. Hart

INVENTOR
 GUY REID
 BY *Amos H. Hart*
 ATTORNEYS

UNITED STATES PATENT OFFICE

GUY REID, OF OSAGE CITY, KANSAS.

COMBINED TOWEL HOLDER AND LOCK.

1,067,622.

Specification of Letters Patent.

Patented July 15, 1913.

Application filed July 18, 1912. Serial No. 710,294.

To all whom it may concern:

Be it known that I, GUY REID, a citizen of the United States, and a resident of Osage City, in the county of Osage and State of Kansas, have invented an Improved Combined Towel Holder and Lock, of which the following is a specification.

As is well known, the surreptitious abstraction of towels in hotels involves a considerable financial loss to the proprietors, and I have devised an improved means for holding and securing towels in toilet and other rooms in such manner as to prevent their removal without interfering with their convenient use. To these ends, I provide the towels with metal eyelets and string them on a bar or rod which is supported in, and locked to, a fixed support, and to whose outer end a chain is attached, the other end of the latter being secured to a wall staple or ring. The towels are normally held on the bar or rod, but may be slid off and down on the pendent chain so as to be conveniently used, the soiled towel hanging on the loose portion of the chain.

In the accompanying drawing Figure 1 is a perspective view of my invention. Fig. 2 is a perspective view illustrating the practical use of the same. Fig. 3 is a detail view partly in section illustrating the connection of the towel-supporting bar or rod with a locking support. Fig. 4 is a perspective view illustrating a modification.

I will first describe the invention as illustrated in Figs. 1, 2, and 3. A horizontal bar or rod 1 is inserted in a support consisting of a lock case 2 which is secured by screws, or other means, to a vertical fixed object, say a wall or a window frame. The rod passes through the lock proper 2, and the latter is provided with a rotatable device 3 adapted for operating a tumbler or locking bar 4 which is adapted to engage a notch in the bar, as shown in Fig. 3. By inserting a key in the rotatable device 3, the bar or rod 1 may be unlocked and withdrawn from the support, when it is required to remove or apply towels.

In Fig. 2, a number of towels x is shown hanging from the bar or rod 1, it being understood that the several towels of the pack have been first arranged with the holes, which are near one corner, in the desired coincidence, and the bar or rod 1 inserted

through them and then engaged with the locking support 2.

A chain, or wire rope, 5 is attached to and pendent from the free end of the towel-support 1, and its lower end is permanently secured to a wall staple or ring 6. As shown in Fig. 1, the lower end of the chain is carried upward to the point of attachment 6, thus forming a loop from which the soiled towels x' depend, as indicated in Fig. 2.

It will be understood that, when a towel is required for use, it is pulled off the bar or rod 1 and drawn down on the chain, as indicated in Fig. 2, and then, after using, it is allowed to fall and descend by gravity to the position indicated at x' . This operation is repeated as often as a towel is desired, until the supply is exhausted, when the bar or rod 1 is unlocked and the soiled towels drawn off the chain and rod and a fresh pack is applied and suspended, like the former ones, in the manner shown in Fig. 2.

In the modification shown in Fig. 4, a number of towels y is applied to a bar or rod 1^a which is arranged vertically instead of horizontally, as in the first case, the locking device 2^a being secured to a shelf 7 supported horizontally on wall brackets. In other respects the construction and operation are precisely the same as before described. In other words, as shown in Fig. 4, the towels are supported on the shelf 7 instead of hanging directly from a rod or bar passing through them. This, of course, relieves the towels from strain and is in some respects more advantageous.

What I claim is:—

The improved apparatus for holding towels and securing them while permitting their use, the same comprising a chain, a fixed wall-ring to which one end of the chain is attached, a lock fixed to the wall above said ring, a rod adapted to enter and detachably engage said lock and extending therefrom to such length as adapts it to serve as a towel holder, the free end of the rod being connected with the chain which depends therefrom, as shown and described.

GUY REID.

Witnesses:

D. A. RAMSEY;
JAS. HEPWORTH.

APPELLANTS' (DEFENDANTS') EXHIBIT "8"
Patent to Heins & Galland, November 11, 1913, No. 1,078,501

T. HEINS & E. R. GALLAND.

TOWEL RETAINER.

APPLICATION FILED JULY 24, 1912.

1,078,501.

Patented Nov. 11, 1913.

Fig 1

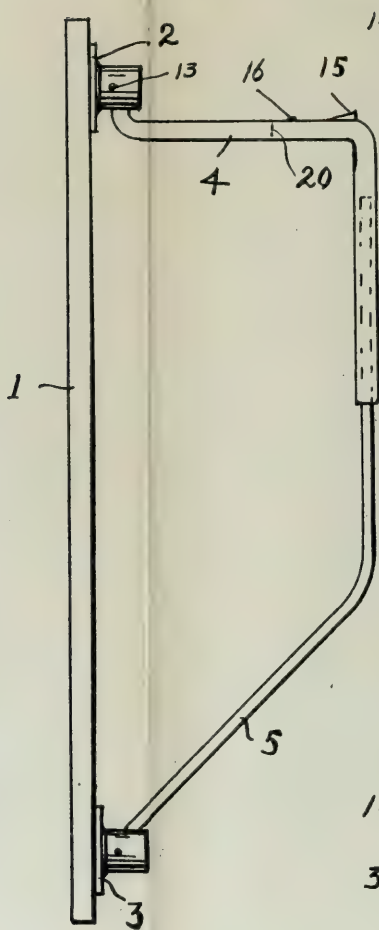


Fig 2



Fig 3

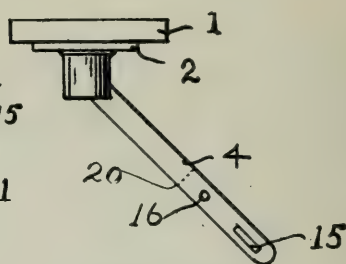


Fig 4

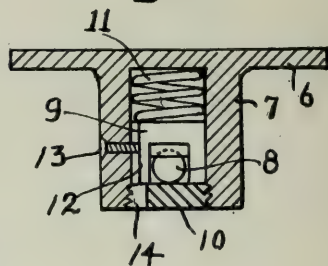


Fig 5

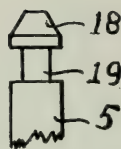


Fig 6

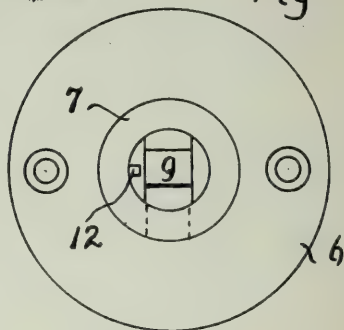
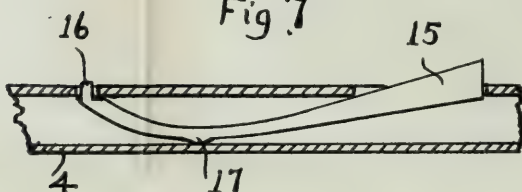


Fig 7



WITNESSES:

H. B. Clark
A. H. Kephart

INVENTORS

E. R. GALLAND AND T. HEINS.

BY
Carlos P. Griffin
ATTORNEY

UNITED STATES PATENT OFFICE.

THEODORE HEINS AND EDWARD R. GALLAND, OF SAN FRANCISCO, CALIFORNIA.

TOWEL-RETAINER.

1,078,501.

Specification of Letters Patent.

Patented Nov. 11, 1913.

Application filed July 24, 1912. Serial No. 711,348.

To all whom it may concern:

Be it known that we, THEODORE HEINS and EDWARD R. GALLAND, citizens of the United States, residing at San Francisco, in the county of San Francisco and State of California, have invented a new and useful Towel-Retainer, of which the following is a specification in such full and clear terms as will enable those skilled in the art to construct and use the same.

This invention relates to a towel retainer and its object is to provide means whereby a supply of fresh towels may be left in a restaurant, saloon, or office, while at the same time, an individual towel is provided for each person, but which towel cannot be removed from the retainer, thus preventing the loss of towels.

It will be understood by those skilled in the art that it is common for office and restaurant supply laundries to furnish a given number of towels per week for the use of patrons. These towels are usually left in a cabinet loose and inevitably disappear in larger or smaller numbers, which disappearance is avoided by the use of the retainer herein disclosed.

In the drawings in which the same numeral of reference is applied to the same portion throughout the several views, Figure 1 is a side elevation of the retainer complete, Fig. 2 is a front elevation of the retainer, Fig. 3 is a plan view of the retainer. Fig. 4 is a horizontal sectional view of one of the brackets for holding the towel support, Fig. 5 is a view of the end of one of the towel supports showing a groove therein for locking said support in place, Fig. 6 is a front elevation of one of the brackets for holding the towel support with the rock retainer removed therefrom, and Fig. 7 is a sectional view on an enlarged scale showing a portion of the towel supporting tube and showing the catch used to prevent the towels from falling off the support.

The numeral 1 represents a board to which the towel supporting brackets 2 and 3 are secured and which board is intended to be secured to the wall where the towels are to be used. The brackets 2 and 3 are suitably secured to the board by means of screws. The brackets support a tube 4 and rod 5 respectively, the rod 5 extending into the tube 4 far enough to prevent its removal therefrom, while at the same time, enough movement is

permitted to allow the tube 4 to slip down far enough to be removed from the bracket 2.

The supporting brackets comprise a flat disk-like portion 6, from which disk a hollow boss 7 extends. The hollow boss has an opening 8 therein through which the tube or rod, as the case may be, may be inserted. Slidable within the hollow boss is a lock 9, said lock being held against the retaining plug 10 by means of a spring 11. The lock has a slot 12 in one side and a screw 13 is passed through the boss to prevent the lock from rotating out of the proper position. The plug 10 has a slot 14 therein for the insertion of a key to push the lock 9 back out of engagement with the rod or tube as the case may be.

In order to retain the towels upon the upper portion of the tube 4, a spring catch 15 is used. This catch has a portion 16 extending through a small hole in the tube 4, and it has a small projection at 17 to bear against the bottom of the tube and thus give the necessary spring to the catch.

Both the tube and the rod have the ends thereof, which are inserted in the brackets, beveled, as shown at 18 and each of them has a groove as shown at 19 for the lock to pass into to secure the tube and rod in place. In order to strengthen the tube 4, it has a rod inserted therein which terminates at the dotted line indicated at 20. It will be understood that any suitable form of lock may be used for securing the rod and tube in their proper places.

In use a considerable number of towels are placed upon the upper portion of the tube 4, each towel having a suitable gromet placed in one corner thereof for hanging the towels on the tube. When used the first towel is pulled down over the latch and after being used is dropped down on the rod 5 out of the way, a fresh towel being ready for the next user.

The towel support may be turned from side to side, it being indicated in Fig. 3 as turned from the right of the supporting bracket so that the support occupies as little space as possible.

Having thus described our invention what we claim as new and desire to secure by Letters Patent of the United States, is as follows:

1. A towel retainer comprising a support, brackets carried thereby, a towel supporting

rod having a horizontal portion and a downwardly extending portion, means to lock said rod to the brackets and to permit said rod to be turned about an axis parallel to the support and passing through the brackets, and means to loosely retain the towels upon the substantially horizontal portion of the rod, substantially as described.

2. In a towel retainer, a support, two brackets carried thereby, a jointed rod supported by said brackets and movable about an axis and passing through both of said brackets, means to lock the ends of the rod

to the brackets, and a spring catch carried upon the upper portion of the rod to loosely retain towels placed thereon, substantially as described. 15

In testimony whereof we have hereunto set our hands this 17 day of July A. D. 1912, in the presence of the two subscribing witnesses. 20

THEODORE HEINS,
EDWARD R. GALLAND.

Witnesses:

C. P. GRIFFIN,
L. H. ANDERSON.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

APPELLANTS' (DEFENDANTS') EXHIBIT "9"

Patent to L. Straub, September 17, 1912, No. 1,038,984

L. STRAUB.
TOWEL RACK.
APPLICATION FILED DEC. 22, 1911.

1,038,984.

Patented Sept. 17, 1912.

Fig. 1.

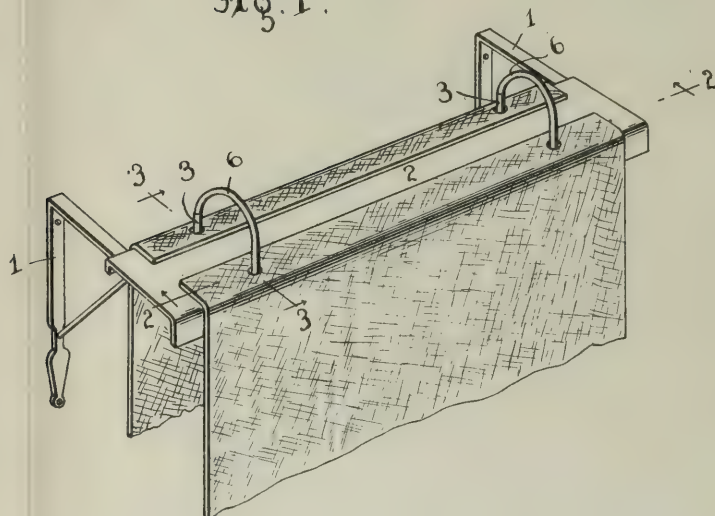


Fig. 2.

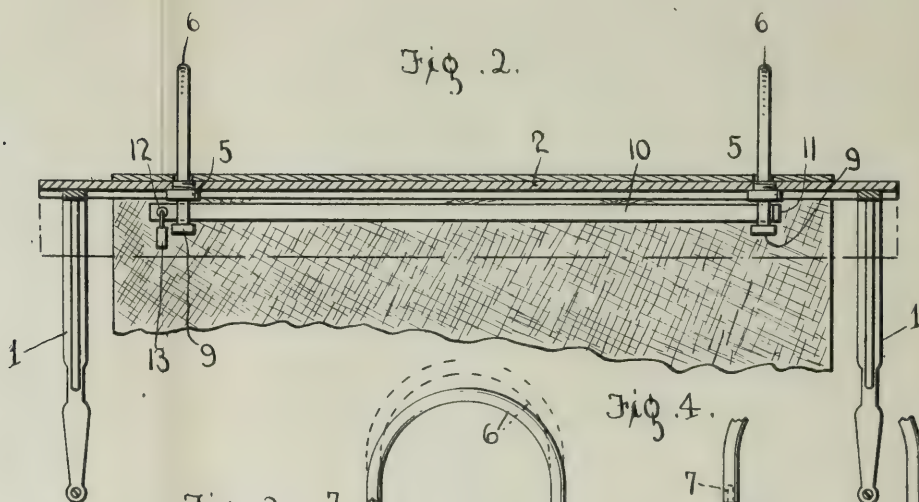


Fig. 3.

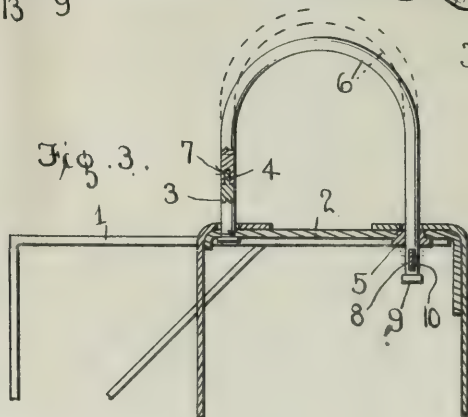
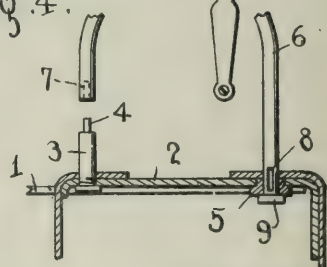


Fig. 4.



Inventor

Louis Straub

Witnesses

L. B. James
C. C. Hunt

by *A. B. Wilson & Co.*
Attorneys

UNITED STATES PATENT OFFICE.

LOUIS STRAUB, OF DENVER, COLORADO.

TOWEL-RACK.

1,038,984.

Specification of Letters Patent.

Patented Sept. 17, 1912.

Application filed December 22, 1911. Serial No. 867,276.

To all whom it may concern:

Be it known that I, LOUIS STRAUB, a citizen of the United States, residing at Denver, in the county of Denver and State of Colorado, have invented certain new and useful Improvements in Towel-Racks; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to improvements in towel racks.

One object of the invention is to provide a towel rack having means whereby a supply of clean towels may be securely fastened thereto in such manner as to permit the same to be successively swung around into position for use.

Another object is to provide a rack of this character having means whereby the towels hung thereon will be securely fastened or locked against removal from the rack.

With these and other objects in view, the invention consists of certain novel features of construction, and the combination and arrangement of parts as will be more fully described and claimed.

In the accompanying drawings; Figure 1 is a perspective view of my improved towel rack; Fig. 2 is a vertical sectional view on an enlarged scale taken on the line 2—2 of Fig. 1; Fig. 3 is a cross sectional view thereof taken on the line 3—3 of Fig. 1 and showing in dotted lines the open position of the towel fastening member; Fig. 4 is a similar view showing one of the towel fastening members in a released and open position to permit the towel to be applied to or removed from the rack.

My improved towel rack comprises a pair of brackets 1, which may be secured to a wall or other suitable support and to the upper arms or members of which is secured a towel receiving plate 2 having its outer and inner edges bent downwardly at an angle to form supports for the towels hung thereon. The plate 2 is secured to the outer portions of the upper bars of the bracket and is spaced a sufficient distance from the wall or other support to which the brackets are secured to permit the towels to be readily reached and swung from the inner to the outer edge of the plate as will be hereinafter more fully described.

In order to hold the towels in position and to securely fasten the same to the rack, I

provide towel holding members comprising studs 3 secured in the plate 2 near the ends thereof and adjacent to the inner edge of the same as shown. The upper ends of the studs are reduced to form pins 4. In the plate 2 near the front or outer edge thereof and in line with the studs 3 are arranged bushings 5 preferably provided with heads or enlarged outer ends and having a threaded engagement with the apertures in the plate as shown. Slidably engaged with the bushings 5 are the bail shaped outer sections 6 of the towel fastening members. The inner ends of the bail shaped members 6 are considerably shorter than the outer ends and in said inner ends are formed sockets 7 with which the pins 4 on the studs 3 are engaged when the members are in operative position. The lower ends of the sections 6 extend a suitable distance below the bushings 5 with which they are engaged and in the projecting lower ends of said sections are formed slots 8 while on the extremities of the projecting ends are formed heads 9.

Adapted to be engaged with the slots 8 in the projecting ends of the sections 6 is a locking bar 10 having on one end a head or offset lug 11 which forms a stop and prevents this end of the bar from being pulled through the slots 8. In the opposite end of the bar is formed a lock receiving aperture 12 with which is adapted to be engaged a padlock 13 whereby the bar 10 is locked against removal. When the bar 10 is engaged in the slots 8 the bail shaped sections 6 of the towel fastening members will be securely locked and the sockets 7 in the shorter end thereof held in engagement with the pins 4 in which position the studs 3 and sections 6 will form practically continuous bail shaped bars or rods for receiving and holding the towels in engagement with the rack.

In using my improved rack any desired number of towels are hung upon the studs 3 after the members 6 have been lifted to the position shown in dotted lines in Fig. 3 and in full lines in Fig. 4, said towels being provided with eyelets or holes to receive the studs 3. After the clean towels have thus been hung upon the studs the sections 6 are drawn down into engagement with the studs and said sections fastened and locked in the manner described. After thus securing clean towels they may be successively swung around from the studs 3 over the bail shaped

sections 4 to an operative position wherein they will be suspended from the rack by the outer sections 6 of the holding members. In thus arranging the towels when one towel 5 has become soiled another may be quickly swung around in position so that each successive person having occasion to use the towels may readily supply himself with a clean towel by swinging one of the latter around 10 over the bail shaped holding members from the rear to the front side of the rack as will be readily understood.

By providing the heads 9 on the lower ends of the sections 6, the latter are pre- 15 vented from being pulled upwardly to a sufficient extent to entirely disengage the lower ends thereof from the bushings 5. The bushings 5 are provided to form a more substantial connection between the bail 20 shaped sections 6 of the holding members and the adjacent parts of the towel supporting plate 2 and also to relieve the edges of the openings in the plate from wear which would occur from the movement of the sections 6 if they were engaged directly in the 25 openings in the plate.

From the foregoing description taken in connection with the accompanying drawings, the construction and operation of the invention will be readily understood without re- 30 quiring a more extended explanation.

Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advan- 35 tages of the invention as claimed.

Having thus described my invention, what I claim is:

A towel rack comprising a flat plate having its opposite longitudinal edges bent 40 downwardly to form towel engaging ledges, means for rigidly supporting the plate in a horizontal position, studs secured adjacent to one edge of the latter, the upper ends of which are reduced to form pins, bails mov- 45 ably mounted upon the plate one end of which are provided with sockets to receive the pins of the studs, a locking bar slidably and detachably located in slots in the lower ends of the bail adjacent the head 50 thereof, whereby when the bar is withdrawn from the slots the bail can be elevated and turned to expose the pins of the studs, and means for holding the bar to prevent longitudinal movement thereof. 55

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

LOUIS STRAUB.

Witnesses:

FRANK H. SPENCER,

MICHAEL A. SWEENEY.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents. Washington, D. C."

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CRYSTAL LAUNDRY COM-
PANY, a corporation, and Percy
G. Allen,

Appellants,

vs.

BROWN - MEYER COMPANY, a
corporation,

Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

APPELLANTS' BRIEF.

T. J. GEISLER,
of Counsel for Appellants.

JOSEPH L. ATKINS,
of Counsel for Appellee.

*In the District Court of the United States for the
District of Oregon.*

Crystal Laundry Company, a corporation,
and Percy G. Allen,
Appellants.

vs.

Brown-Meyer Company, a Corporation,
Appellee,

No. 2972

APPELLANTS' BRIEF

This is a companion case of that No. 2971 in this court entitled "Broadway Towel Supply Company et al., appellants, vs. Brown-Meyer Company, appellee."

The same patent is alleged to be infringed as in said other cause, the same defense is interposed, and the same interlocutory decree adjudging infringement presented. The two causes were tried jointly and the same opinion by the trial judge disposed of the issues in both causes.

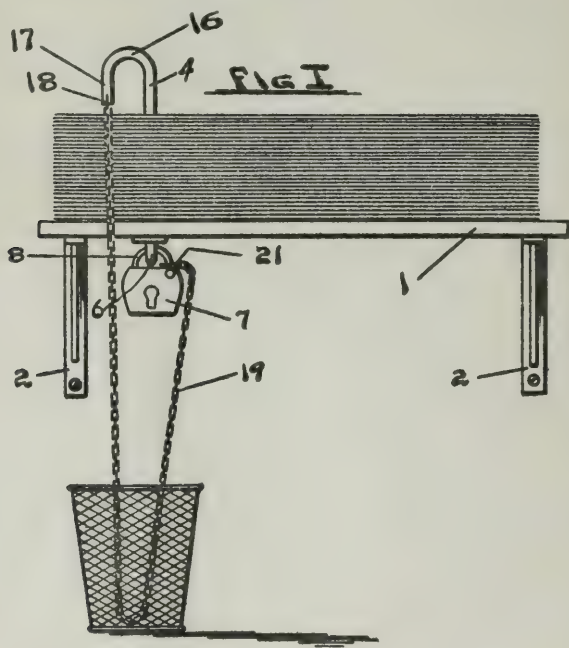
No appeal was taken by appellants from the interlocutory decree because they preferred to present all the questions raised by their defense at one time. So the case went to accounting. Then it was that the circumstances arose in this appeal to be reviewed, and from which appellants seek relief. If the preliminary matters are understood, we may turn immediately to the facts on the questions involved on this appeal, which facts are stated on page 18 of this brief.

For the convenience of the court hearing this appeal, so much of the brief of said companion case as describes the patent in suit and its particular features, and the device first used by appellants and adjudged by the District Court to infringe is here copied in this brief:

THE PATENT IN SUIT is that granted to C. F. Brown November 3, 1914, No. 1,115,895, for a Towel Holder, on an application filed August 13, 1913; and he had assigned his entire interest to the Brown-Meyer Company, the appellee.

A copy of this patent is to be seen in the "Appendix of Documentary Evidence" in the Transcript of Record following page 123.

The following "Fig. 1" from the Brown patent drawing shows the whole idea.





The parts of this device Brown termed as follows: 1, a supporting *shelf*; 2, *brackets* thereof; 4, the *assembling member*, or post, rotatably supported on the shelf 1 and made with a crooked head as at 16. The towels in use are strung on the towel-stringing chain or "*flexible retaining member*" 19, which is secured at its upper end, 18, to the crooked top-end of the assembling member 4, and is provided at its lower end with an *eyelet* 21 by which it is fixed on the *shackle* 8 of the *padlock* 7.

The questions propounded require no extensive examination of the record of this cause.

Both appellants and appellee conduct laundries in the city of Portland, and are particularly engaged in furnishing towels for use in the lavatories of public buildings, and other places.

For sanitary reasons the idea had been conceived of supplying individual towels in public places. In the city of Portland such was required by an ordinance.

Experience showed that if the individual towels were supplied loose, a considerable number would be lost. Hence inventors sought to provide a towel-rack which would allow a fairly convenient use of the towels, but at the same time tie them in place.

As far as the record shows, the subject had received the attention of inventors since 1896.

Brown adopted bodily a prior patented device (as will presently be shown) to which he added a functional improvement.

The appellee used its device publicly for some time prior to the issuance of said Brown's patent, and being a fairly convenient device, appellant company adopted it, not knowing that it was being patented.

The device which appellants were using on November 3, 1914, is shown by the cut opposite this page.

As well known, Patent Office proceedings are confidential; and of course appellants could not be charged with notice of the Brown patent until its issue November 3, 1914, and the further time required by mail for bringing actual notice to Portland, Oregon.

In fact the first actual notice which appellants had of said patent was a letter received from appellee's attorney in the early part of November, 1914. (Trans. 87, 92.)

Immediately after receiving such letter, Allen, of appellants, called on inventor Brown about the matter, and was referred to the latter's attorney. There were further interviews between Allen and Brown, and his attorney (Trans. 88), but these lead to nothing.

Then appellants consulted an attorney who procured the record, i. e., the "File Wrapper" of the Brown patent. When the File Wrapper had been examined appellants were advised by their counsel that the device they were then using infringed the Brown patent, but such infringement could be avoided by changing the arrangement of the towel-stringing chain; and thereupon appellant's device was re-arranged as shown in the following cut:

Note that the lower end of the towel-stringing chain (19) of the Brown device is attached to the lower end of the towel-assembling post (4), while in appellant's rack, *after its change*, above illustrated, the lower end of the chain was permitted to hang down into, and fastened to the bottom of a basket.

Appellants were advised by their counsel that the file wrapper showed a device prior to Brown, invented



by one Reid, which they might follow by making the change stated, and thus avoid infringement of the Brown patent.

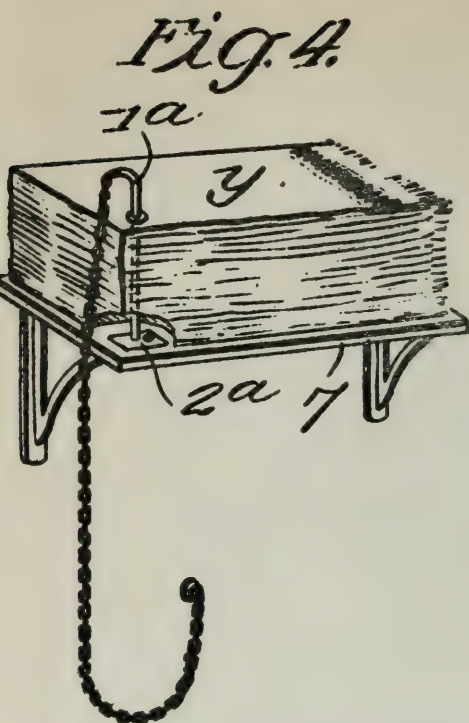
The File Wrapper of Brown's patent disclosed the following facts:

When Brown filed his application, a number of patents had already been issued for towel racks, directed to the same general purpose Brown had in mind; and these patents were cited by the Examiner of the Patent Office in the prosecution of Brown's application. All such patents are contained in said "Appendix of Documentary Evidence," but it is only necessary to deal with a few of them.

The most important—really the progenitor of all the essentials of the Brown device—is the patent of *Guy Reid* issued July 15, 1913, No. 1,067,622, entitled "Combined Towel Holder and Rack."

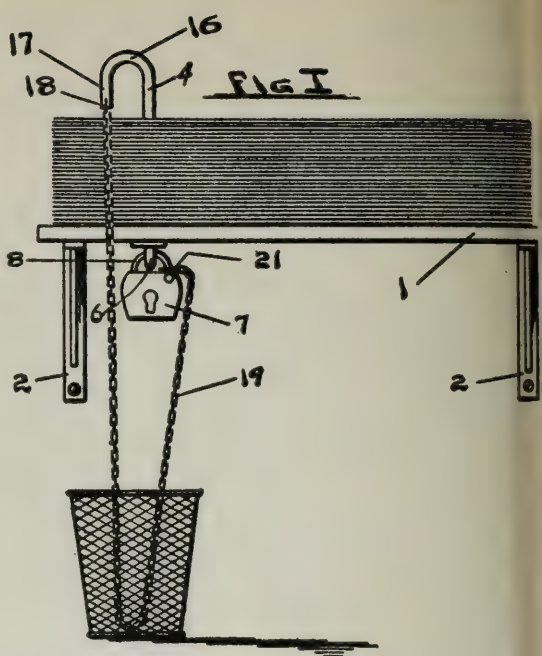
It is to be noted that the application for said Reid patent was filed about a year before the Brown application; and Brown in his amendatory letter of Feb. 19, 1914, to the Patent Office (See *File Wrapper*, Trans. p. 104) *admitted that the application on his own improvement was drawn in view of the disclosure of this Reid patent.*

A clear idea of the bearing of the Reid device on the Brown device is readily obtained by placing Fig. 4 of the drawing in the former patent side by side with Fig. 1 of the drawing in the later Brown patent, as here done.



The earlier Reid Device as shown in his patent drawing, Fig. 4.

7 is a shelf on which is mounted a rod 1^a secured to the shelf by a locking device 2^a . y represents the number of towels placed on the rod or towel assembling post 1^a .



The later Brown Device as shown in his patent drawing, Fig. I.

1 is the supporting shelf, 2, the brackets therefor, 4 the assembling member or post, 16 the crooked head of the latter to the dependant end 17 of which the upper end 18 of the chain 19 is attached, the lower end of the chain being provided with an eyelet 21 for fastening on the shackle 8 of the padlock 7.

A parallel statement of excerpts from the printed specifications of these two patents, as here given, will also aid their understanding.

The REID PATENT,
dated July 15, 1913.

* *

“As well known, the surreptitious abstraction of towels in hotels involves a considerable financial loss to the proprietors, and I have devised an improved means for holding and securing towels in toilets and other rooms in such manner as to prevent their removal without interfering with their convenient use. To these ends I provide the towels with metal eyelets and string them on a bar or rod which is supported in, and locked to a fixed support, and to whose outer end a chain is attached, the other end of the latter being secured to a wall staple or ring. The towels are normally held on the bar or

The BROWN PATENT,
dated Nov. 3, 1914.

* *

“My invention relates to towel holders, and has for its object the production of a device for holding and preserving in order an assemblage of clean towels. * * A further object of the invention is to provide means for conveniently withdrawing the towels one by one from the pile, for facilitating the manipulation of it while in use, and for securing it against accidental displacement or intentional or unauthorized removal after use.” (Printed specification Brown patent, lines 9 to 24, page 1.) * * *

“The rigidity of the assembling member (4), which is preferably made a feature thereof, serves to

rod, but may be slid off and down on the pendant chain so as to be conveniently used. The soiled towel hanging on the loose portion of the chain.” (Page 1, lines 8 to 25 of Reid printed specification.) * * *

“When a towel is required for use it is pulled off the bar or rod 1a and drawn down on the chain, * * * and then, after using, it is allowed to fall and descend by gravity * *” (Ib lines 65 to 69, page 1.)

secure the clean towels in place upon the shelf, while the flexibility of the retaining member, constituting as it does in fact a continuous extension of the assembling member, provides for the widest latitude of manipulation of individual towels in use.” (Ib, lines 90 to 98, p. 2.)

The claims in the Brown patent read:

1. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for securing both ends* of said retaining member to the assembling member.

2. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for*

detachably securing both ends of said retaining member together.

3. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end of the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member.

4. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

An examination of the history of this patent, as furnished by the File Wrapper, will show that the novelty in these combinations alone resides in the particular functional arrangement of the towel stringing chain, set forth in such claims, for:

The crooked towel-assembling member—by which a horizontally stacked batch of towels may be lifted up, clear of the supporting shelf—was previously shown in the design patent to J. Rouso, No. 42398, granted April 9, 1912; also in the patent to L. Straub, No. 1,038,984, granted Sept. 17, 1914. The latter also shows the crooked towel-assembling member as *rotatably* supported on a shelf.

And the combination of a shelf, a crooked towel-assembling member or post, and a chain-like or "flexible towel-retaining member" is shown in said patent to G. Reid, No. 1,067,622, granted July 15, 1913. The latter really is the prototype of all the essentials of the Brown device, and differs only therefrom in that it does not have the same functional arrangement of its chain, 5, as the chain, 19, of the Brown device.

When Brown filed his application he made the following *additional claims*, (see File Wrapper, Trans. p. 104) which were *rejected and cancelled*:

1. In a towel holder or the like, the combination with a movable supporting member, of a flexible towel retaining member secured in its entirety thereto.

2. In a towel holder or the like, the combination of a movable supporting member, of a flexible towel-retaining member, and means for detachably securing the latter in its entirety to the former.

5. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member co-operative with said assembling member.

6. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member carried by said assembling member co-operatively with said supporting member.

7. In a towel holder or the like, the combination with a supporting member provided with a socket, of an

assembling member mounted in said socket, and a retaining member detachably secured to the assembling member.

8. In a towel holder or the like, the combination with a supporting member provided with a socket, of an assembling member mounted therein, a retaining member carried by the assembling member, and common means for securing the retaining member to the assembling member and the assembling member to the supporting member.

11. In a towel holder or the like, the combination with a supporting member, of a towel assembling member provided with a threading point, and means for operatively uniting said members, substantially for the purpose specified.

An analysis of the claims in the Brown patent brings out the fact that each of the combinations set forth in its broadest aspect consists of these elements:

1. A shelf.

2. A post-like "towel assembling member" supported (rotatably or otherwise) by the shelf.

3. A chain or flexible towel-retaining member—this chain being secured at its top end to the towel assembling post.

4. Means (specifically a padlock) for detachably securing the lower end of the chain to the lower end of said post.

In the play of language used in claim 1 of the Brown patent, the padlock is defined as:

"means for securing both ends of said retaining member (chain) to the assembling member (post)."

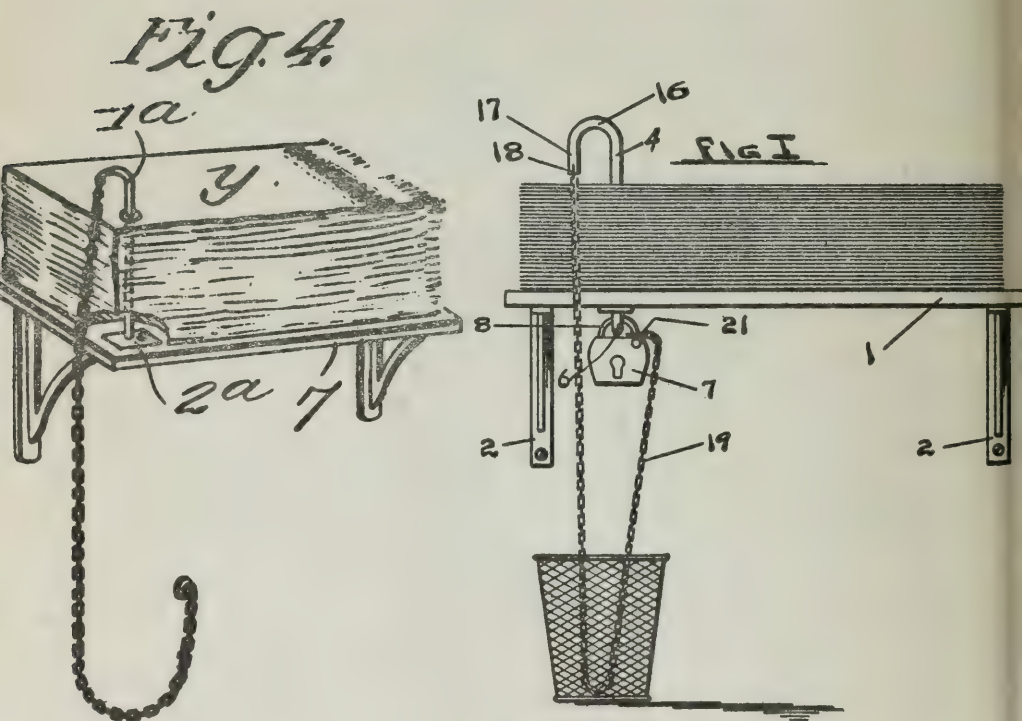
And in claim 2, as:

“means for detachably securing both ends of said retaining member together.”

These latter designations of the Brown chain, with respect to its particular arrangement, is somewhat obscure, but is aided by the explanation contained in Brown's amendatory letter of Feby. 19, 1914, in which he states to the Examiner (Trans. 109) “Let it be noted that in applicant's construction his assembling member (the post) constitutes an elongated link of special function in the retaining member (the chain).”

But we need not bother with this refinement of language and just get down to “brass tacks” as it were.

Here again, for convenience, are given comparative views of the devices patented to Reid and Brown.



And applying the simple process of subtraction of the former from the latter, we see that the substance of the Brown invention is the rearrangement of the towel-stringing chain of the prior Reid patent, so that the lower end thereof is attached to the lower end of the towel-assembling post, directly under the shelf, instead of to a point below the shelf, as in the Reid device.

It is to be noted that Brown tried to secure, but it was denied him, claims not including said particular feature for see said rejected and cancelled claims 5 to 8 and 11 above referred to.

It is further to be noted that in each of the four claims of the Brown patent, *the flexible member—the chain—has a particular FUNCTION ascribed to it.* Thus in claim 1 the particular arrangement of this chain is stated to be “for the purpose specified,” i. e. in the specification, in which we are told (see printed copy of Brown’s patent, p. 2, lines 96 to 98) that it “provides for the widest latitude of manipulation of the individual towels as illustrated in Fig. II of Brown’s patent. In his amendatory letter of July 23, 1914, (Trans. 115) Brown further amplifies this function of the particular arrangement of his chain as follows:

“The combination described in claim 3 (being claim 1 of the patent) defines a special construction and a distinct utility. It is this, in the Reid device, as shown partly in Figure 2, each individual towel must be used in close proximity to the other towels, clean and soiled, upon the holder. Of course, it may be said that this situation may be relieved by increase of length of chain.

But this does not meet the situation. To increase the length of chain beyond certain limits is impracticable, would tend to defeat the purpose of the device, in the kinking of the chain, for example. Applicant has devised means for obtaining the maximum availability of each individual towel in use without impairment of the certainty of operation of the device."

From the foregoing analytic examination of Brown's patent, it is obvious that the margin of patentability of his alleged improvement over the prior Reid device was exceedingly small.

But appellants did not concern themselves with that question. True, they did not want to be deprived of their rights, yet they decided to avoid infringement of whatever patent appellee had. They promptly changed their device, as mentioned, and offered to settle on any reasonable basis for the month's prior infringement (Trans. 85, 88).

Referring again to the arrangement and operation of appellant's device, after changed as above illustrated, it is to be noted that this device did not then embody the crucial and dominant element of the Brown patent, for *it did not embody a chain—or flexible retaining member as Brown terms it—having both ends secured to the towel assembling post.* And appellants contended that they no longer infringed. But appellee disputed appellants' contention; appellee claiming that appellants' device, notwithstanding said changes, still infringed, because it still embodied "*means by which this device MIGHT be rearranged and then used like the Brown device.*"

This suit then followed. The evidence taken therein developed the facts above stated.

It was conceded on the trial (Trans. 82), that appellants' device, after its said change, was used only with the lower end of the towel-stringing chain hanging down and fastened to the bottom of the basket, and that the lower end of the chain was not fastened to the lower end of the assembling member, or post.

The District Court in finding in the affirmative on the question of infringement, reached conclusions clearly erroneous, it is submitted, as shown by the following excerpts from its opinion: (Trans. 15, 16, 17.)

“The claims of the complainant's patent, it must be conceded, are subject to narrow construction. * * *”

“The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance.”

“* * * I am not persuaded that the simple means of attaching the chain or retaining member to the bottom of the basket on the inside instead of at the foot of the assembling member, varies the device to such an extent as *to add a new discovery*, or even an old element, to the combination. The complainant's device is so constructed that the basket may be used in connection with it as a depository for the soiled towels. The defendants' device simply makes the basket a depository and merely changes the place of attachment for the lower end of the

chain or retaining member. As an illustration, in the Reid patent, the lower end of the chain is attached to a wall, and yet the patent to complainant's assignor was granted notwithstanding the prior patent of Reid. *Now suppose that the defendant had used the Reid patent and simply detached the chain from the wall and attached it to the bottom of the basket and used the basket as a depository for the towels, could any one say that such change constituted an added discovery or new element to the Reid patent?* The Reid retaining member could have been used by elongating the chain so as to drop the sag into a basket and thereby bring the basket into play as a depository as the complainant uses a basket."

"Thus I cannot conceive that the detachment from the lower end of the assembling member in the Brown patent and attaching it to the bottom of the basket or depository is the adding of a new element or discovery to the defendants' device, and am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement."

Manifestly the defense of appellants was erroneously conceived by the lower court, and it is not controlled by any such rule of law as suggested by the opinion.

The defense of infringement in the Answer was stated as follows: (Trans. p. 9, 10, 11)

"That the alleged invention of said Charles F. Brown related to towel holders designed for supplying individual towels to users, and that this was a well and highly developed art before said Brown entered into the field,

with his said alleged improvement, as is shown by the following patents: (here are stated the patents cited by the Patent Office against Brown's application as originally presented.)

"That, therefore, the alleged improvement of said Brown, if it did constitute an invention, was of a very specific and limited character, and must be construed accordingly in order not to encroach upon the rights which were vested in the general public prior to, and at the time said Brown entered said field."

"That the defendants admit that they made and used a few towel holders embodying the features set forth in said claims of said alleged letters patent, but such making occurred some time before said letters patent were issued, and before the defendants had any knowledge of said Brown's alleged invention, or that said letters patent were to be issued therefor; and immediately after the defendants were informed of said letters patent, they notified the plaintiff that they would discontinue the use of towel holders embodying features covered by said letters patent; and did thereupon proceed immediately to change over their said towel holders so that same would, and did, not infringe upon said letters patent."

The change so referred to was the arranging of the towel stringing chain in the same manner as shown in said patent to Reid, which was prior to Brown's invention, and which appellants had as much right to use as appellee.

While in the midst of the accounting, appellee suddenly summoned appellants back into court to show cause why they should not be punished as for contempt, for the reason that after the entry of the interlocutory decree and service of the same, appellants have continued "to use devices * * embodying the invention * * which was enjoined * * being of a form modified in certain immaterial details * * and *which appears to be*, nevertheless, clearly covered by *the terms* of the patent sued on, as determined in the decree aforesaid."

This motion was based on the affidavits of R. P. Meyer, an officer of appellee corporation and George T. Brown, also an officer of said corporation, and the inventor of the patent in suit. Meyer in substance stated (Trans. p. 21) with regard to the device alleged to infringe, that the same was "*of a form modified in certain details* which he is advised and believes to be immaterial and to be covered nevertheless by the terms of the patent sued on in said suit." Brown stated (Trans. 23) the exact same facts alleged by Meyer.

The charge was also made that appellants used some towel racks which were identical with the Brown patent claims.

The appellants answered admitting "that a single towel rack of the kind held by the court to be an infringement of the patent in suit, was inadvertently left by (them) in the hands of Meier & Frank Co. * * *"
That before the injunction had been issued positive in-

structions had been given to remove all said towel racks, but this single one had inadvertently been overlooked.

“That there are no other towel racks used by defendants’ corporation which resemble the towel rack held to be an infringement. That defendants have offered plaintiff unqualified opportunity to inspect all their towel racks, and have informed complainant of the location thereof. That defendants have endeavored faithfully to respect the order of this court in the premises, and will at all times continue so to do.”

“That complainant did not call the existence of said single towel rack to the attention of defendants, otherwise than by said contempt proceedings, notwithstanding that complainant and defendants were in daily conference for some time past in making up a statement for the use of the Master in the accounting proceedings. That immediately upon having said single rack called to defendants’ attention, the same was instantly removed. That furthermore, in the accounting proceedings it was agreed between complainant and defendants that all towel racks now in use by defendants, other than roller towels, should be tabulated, so that all questions which concern the premises can be submitted to the master. That complainant has stated to defendants that they will base the recovery which they claim to be entitled to on the number of used towels and not on the number of racks in use, and defendants have given complainant a full and true statement of the number of towels.”

“Therefore, complainant has not suffered any loss by said inadvertent use of said overlooked towel rack,

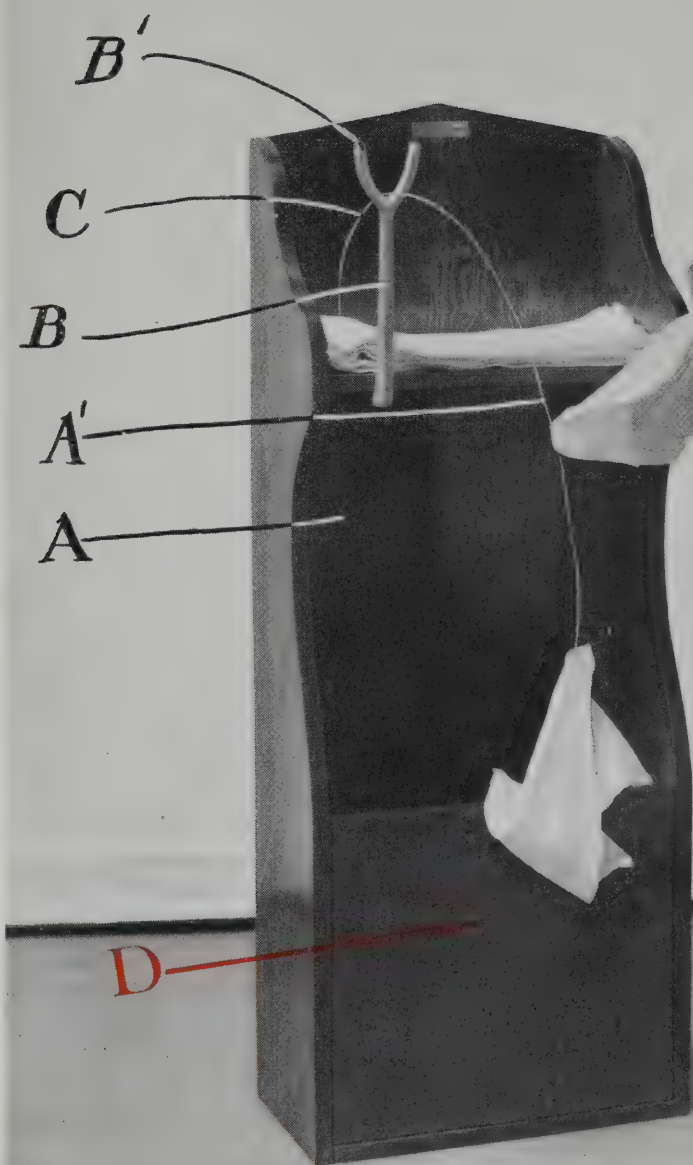
but have a full account, and will have full recovery on all towels in accordance with what may be the final determinations of the court in the premises.”

The District Court condoned the inadvertent acts of appellants with regard to said single towel rack (see supplemental decree, fifth paragraph, Trans. 30) overlooked by appellants and that disposed of that question.

But the main purpose of appellee’s motion for contempt was to obtain a supplemental decree adjudging a *modified towel rack* adopted by appellants after the interlocutory decree to be also an infringement of the Brown patent.

The towel rack complained of is shown in the following cut of a photograph of that device which was presented before the court. And for comparison here is again given a view of the Brown patent as shown by Figure 1 of his patent drawings.

Note that there was no positive charge on the part of appellee that the Ammann device infringed the Brown patent. All that was stated in the affidavit of Meyers and Brown (Trans. 21, 23) was that they were advised and believed that the Ammann device is covered by the terms of the patent sued on. Other than these affidavits there was no ~~other~~ proof submitted on behalf of appellee. (See Order and Motion of appellants to vacate supplemental decree, Trans. 57.)



A, the case; A', a shelf; B, post mounted thereon having forked upper end B'; C, a wire having its upper end led through the shelf A' and fastened on the under side of the latter to a sort of snap hook, the lower end of the wire C being fastened to a sort of snap hook in the bottom portion D.

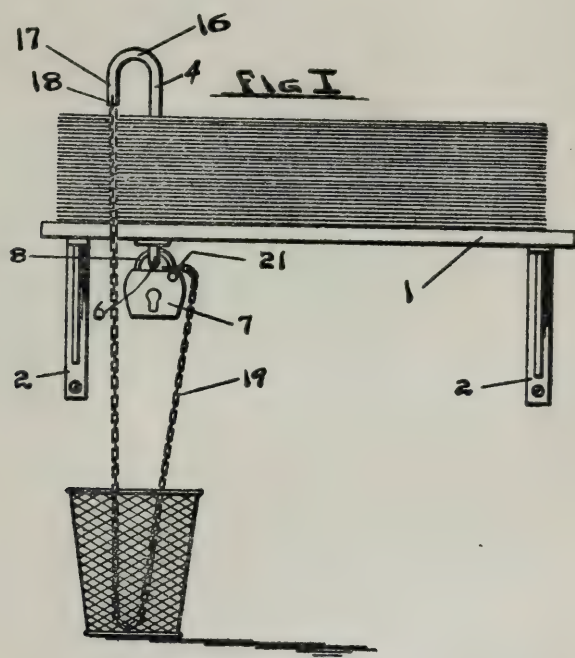


FIG. 1 OF BROWN PATENT DRAWING

The court, from a mere comparison of the two devices, adjudged infringement by said other device of the Brown patent, also entered the following supplemental decree:

“SUPPLEMENTAL DECREE.

This 21st day of March, A. D. 1916, this cause coming on to be heard before the Honorable Charles W. Wolverton, District Judge, on certain affidavits filed herein charging defendants with contempt for violation of the injunction heretofore granted in this cause, both parties being represented by counsel present. And the Court having heard argument of counsel for both parties and having considered said affidavits, and also the modified device admitted by the defendants to have been used by them and complained of by plaintiff as constituting a continuing infringement since the decree made in this cause of the patent in suit, said device comprising a shelf, a wire towel retaining member, snap hooks secured to opposite ends of said member and adapted to secure said member to the shelf, and a staff or supporter on the shelf for supporting a portion of said member above the shelf,

“Now, therefore, upon consideration thereof it is ordered, adjudged and decree as follows:

“First. That the aforesaid modified device infringes upon the patent in suit, to-wit: United States Letters Patent No. 1,115,895, granted and issued on the 3rd day of November, 1914, to Brown-Meyer Co., assignee of Charles F. Brown.

"Second. That the defendant, Crystal Laundry Co. and Percy G. Allen, in the use, manufacture or sale of said modified device, have infringed and do infringe upon the claims of said Letters Patent, and upon the exclusive rights of the complainant under the same.

"Third. That the special master in this cause, John B. Cleland, shall take into consideration said modified device and report thereon to the court in accordance with the instructions and under the authority of his original appointment to act as Special Master in this cause.

"Fourth. That the manufacture, use, and sale, manufacture, use or sale of said modified device constitutes a violation of the injunction heretofore granted and issued in this cause.

"Fifth. That in respect to said violation of the injunction and in respect also to the violation thereof complained of in the use of one of the identical devices covered by the original decree, the court condones the offense upon the present showing made to the satisfaction of the court that the said use in a single instance of the said identical device covered by the original decree was made unintentionally, and that in all other respects the order of the court will be strictly and fully, without any delay, complied with."

The modified device so adjudged to be in contempt was invented by one Henry A. Ammann, and appellants had a special license from him to use the same in their individual towel service business.

At the hearing of the motion for contempt, appellants had had no opportunity of communicating with Ammann. When they had had that opportunity, they were informed by Ammann that his device antedated the Brown device, and that he was prepared to prove such fact.

Thereupon the appellants moved to vacate said supplemental decree by the following motion: (Trans. 31.)

“And now comes the above named defendants and move the court, on the annexed petition of the above named defendants, verified March 31, 1916, and other papers and exhibits therein referred to, to vacate the supplemental decree entered in this cause on the 21st day of March, 1916, and that thereupon the parties to this suit be required to submit to the court, or to the Master by the court appointed, as the court may deem expedient, all proofs which they may have concerning the particular wire towel rack referred to in said supplemental decree, and with regard to its bearing upon the alleged improvement in towel racks claimed to be covered by the complainant's patent in suit, in order that the court may thereupon take such further proceedings in this cause as to it may seem meet; and that the defendants may have such further and other relief in the premises as may seem just.”

And supported such motion by the following affidavits, which are here at length repeated from the record, because giving the facts in as brief manner as it would be possible to state them: (Trans. 32-45.)

"I, PERCY G. ALLEN, being duly sworn, say that I reside in the City of Portland, State of Oregon, that I am the president of the above named defendant, Crystal Laundry Co., and also one of the defendants, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the contempt proceedings then being heard before the Hon. Charles E. Wolverton, United States District Judge, on the representations presented to said Judge by the complainants in this suit; and that in such proceedings a certain wire towel rack, of which a photograph is hereto annexed and marked "Exhibit A" and referred to as a part of this affidavit, was presented by complainant's counsel, Joseph L. Atkins, to the court as being an infringement of the towel rack described in the patent in suit, and the claims of the latter; and that in the course of such proceedings said complainant's counsel did point to and state to the court that the construction of the towel rack shown in said Exhibit A was the equivalent of the towel rack described in the patent in suit; that the shelf A' of Exhibit A was the equivalent of the shelf or supporting member of the Brown device covered by the patent in suit; that the post B with its forked end B' was the equivalent of the towel assembling member of the patent in suit; and that the wire C was the equivalent of the flexible retaining member of the patent in suit; and that the means by which the top end of the wire C was secured to the shelf A' was also adapted to have the lower end of the wire C secured thereon, and thus provide means which were equivalent to the means specified in said

Brown patent for securing both ends of the flexible retaining member therein shown in connection with the assembling member. And I also heard the complainant's counsel state as the reason why he considered the wire towel rack shown by Exhibit A to be an infringement of the patent in suit was that the lower end of the wire C could be removed from its point of attachment at the base of the case A and fastened to the same means to which the upper end of the wire is secured in said wire towel rack.

"That I am informed, by an examination of the application for patent made by one Henry A. Ammann, whose application is still pending in the United States Patent Office under Serial No. 864,059, having been filed September 29, 1914, that the said Ammann invented his towel rack prior to June 15, 1913, and at that time did disclose to others his said invention, and built a full-sized towel rack embodying said invention, and that such towel rack was operated in the presence of others, and operated successfully. That the said Henry A. Ammann resides at Spokane, Washington, and I have requested him to make an affidavit of said facts himself, that I expect to receive such affidavit within a few days and when obtained will be served and filed in connection with this, my own, affidavit in the premises.

"That the wire towel rack so invented by said Henry A. Ammann, and described and shown in his application for letters patent, is substantially of the same construction, and also operates in the same manner as the

towel rack presented in court, as aforesaid, and shown by said photo Exhibit A hereto attached."

"I, JOHN A. CLANCY, being first duly sworn, depose and say that I reside in the City of Portland, State of Oregon, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the time of the hearing of the contempt proceeding referred to in the annexed affidavit of Percy G. Allen, and at said time there was presented before the Hon. Charles E. Wolverton, United States District Judge, who heard said contempt proceeding, a wire towel rack which was later photographed and is represented by the photograph Exhibit A hereto attached; and that I also heard the complainant's counsel, Mr. Joseph L. Atkins, state before the court that he considered said wire towel rack an infringement upon the patent granted to Charles F. Brown, November 3, 1914, being the patent involved in this suit; and I heard the said complainant's counsel compare said wire towel rack with the towel rack described in the patent in suit, and in such description heard said complainant's counsel describe the shelf marked A' in Exhibit A, showing said wire towel rack as being the equivalent of the shelf in the device described in the patent in suit; the forked post B' to be the equivalent of the towel assembling member of the patent in suit; the flexible wire C to be the equivalent of the flexible retaining member of the patent in suit; and the means for fastening the upper end of said wire C to the bottom of the shelf A' being the equivalent of the means provided for

securing the bottom end of the flexible member in the patent in suit."

"I, AMOS BURG, being first duly sworn, say that I reside in the City of Portland, State of Oregon, that I have read the foregoing affidavits of John A. Clancy and Percy G. Allen, that I was present in the United States District Court at Portland, Oregon, on the 21st day of March, 1916, at the time of the hearing of the contempt proceeding before the Hon. Charles E. Wolverton, United States District Judge; that I was also present in court on said day and heard counsel for complainants describe said wire towel rack shown in the accompanying Exhibit A, and that the statements made in said annexed affidavits of John A. Clancy and Percy G. Allen, with respect to what was said by complainant's counsel at that time, with regard to the construction and operation of the wire towel rack shown by said Exhibit A, and its bearing on the device shown in the patent in suit, are in all respects correct as I know of my own knowledge, by reason of being present on said occasion."

"I, WILLIAM C. SCHMITT, being first duly sworn, say that I am a graduate engineer, having given special attention to patent matters for some years past, and am duly admitted to practice before the United States Patent Office. That I am conversant with the reading of the patent drawings and specifications. That I have read what I believe to be a copy of the specification and seen a blue print of the drawings constituting a part of the application for patent filed by Henry A. Ammann for an improvement for towel racks, Septem-

ber 29, 1914, in the United States Patent Office under Serial No. 864,059. That I have also seen the device described in the annexed petition of the above named defendants to be the towel rack shown by Exhibit A hereto attached, and in said petition referred to; that said photograph, Exhibit A, is a photograph of said towel rack, and that said towel rack is the identical device described and shown by said drawings and specification in said application of Ammann.

“That said ‘Exhibit A’ consists of an upright case A, open at the upper part of the front, in which open part is a shelf A’, on which is mounted a post B having a forked upper end B’. A wire C has its upper end led through a shelf A’ and is fastened on the under side of the latter to a sort of snap hook, and the lower end of the wire C is fastened to a sort of snap hook provided in the bottom of the portion D. The towels are strung on the wire C, and in use are brought over the fork and dropped in the receptacle C as illustrated in the photograph.

“That the device shown by Exhibit A is substantially in accordance, both in construction and operation, with the device disclosed by said application for patent of Henry A. Ammann. That included in the copy of the latter’s application shown to me is an affidavit on behalf of said Henry A. Ammann giving a description of a device which he, said Ammann, invented prior to June 15, 1913; and that the description of the device given in said affidavit tallies, in respect to construction and operation, substantially with the description of the invention contained in said application

for patent of said Henry A. Ammann, and also with the construction and operation of said Exhibit A."

"I, VIVIAN FLEXNER, being duly sworn, depose and say that I reside in the City of Portland, State of Oregon; that I am the duly appointed stenographer who is taking the testimony before the Master on the accounting in the above entitled suit, and that on the 30th day of March, 1916, in the hearing before the Master, the following matters were stated by the counsel for the respective parties in my presence:

"Mr. Geisler: The plaintiff's counsel admits that he did contend before the court on the hearing at which the supplemental decree was entered, that the device marked Complainant's Exhibit EE, is an infringement of the patent in suit.

"Mr. Atkins: Complainant's counsel adds that the court considered that, passed upon it and signed the supplemental decree to that effect.

"I do further state that I have examined the photograph hereto attached as Exhibit A, and that such photograph shows the device which was referred to in said statements as Exhibits EE."

"HENRY A. AMMANN, being first duly sworn, doth depose and say, that he is the applicant of finally allowed United States application for patent for improvement in towel racks, filed in the Patent Office, at Washington, D. C., on the 29th day of September, 1914, bearing serial No. 864,059.

"Affiant avers that the aforementioned record in the Patent Office shows that the patent to C. F. Brown,

No. 1,115,895, issued November 3, 1914, and having an application filing date of August 13, 1913, was cited as an anticipatory reference against certain claims of the aforementioned patent application.

“That prior to June 15, 1913, applicant conceived the idea of stringing towels on a flexible line or wire with the towels supported on a shelf and one end of the wire anchored to the shelf and the other end of the wire anchored to the floor, and affiant conceived the idea of a fork-like but entirely open guide for engaging an intermediate portion of the flexible line or wire, and that prior to June 15, 1913, applicant, himself, constructed an actual full size device fully embodying his conception. The said device was constructed in affiant’s barn at 715 East Front Avenue, Spokane, Washington, as he did not desire to disclose the invention to anyone excepting the foreman of his laundry and his bookkeeper, whose names are, respectively, George W. Blood and John Frank Clinton. That when the device was completed it was in all respects according to the attached photograph marked Exhibit A; that in said device, the fork or open guide consisted of an upright board A, nailed to a shelf B, and that the shelf B was fixed to a board C, anchored to the wall in the office as indicated by nails D. In forming the fork, the latter was notched at E to form a guide for the flexible wire F. One end of the flexible wire F extended through a stack of towels G and through the support B where it was anchored at H. The wire extended downwardly and was anchored to the floor at I.

"Affiant avers that the attached photograph is not a photograph of the original device, but is a photograph of a device built in all respects similar to the original device. Although diligent efforts have been made to locate the original device, it has been found impossible to do so by reason of the fact that shortly after the original device was constructed, affiant moved his toilet supply business from the old plant at 715 East Front Avenue, Spokane, Washington, to the new plant at 629-31 Erie Street, Spokane, Washington.

"The original device, precisely in accordance with the attached photograph, was set up by affiant at his old laundry, prior to June 15, 1913, and that the said Blood and Clinton were present at the time, and said device was carefully and exhaustively operated and examined to determine whether or not the towels would remain in stacked order on the shelf in view of the pulls and jerks on the wire incident to the operation of wiping the hands or face, and affiant and each of said parties advanced the towels singly along the wire and over and through the fork guide to determine whether or not the plan and device were feasible. The said Blood and Clinton, and affiant, further examined the towels to determine whether or not the yield of the wire would be sufficient to prevent the formation of enlarged holes in the towels as the same were drawn along the wire and used for wiping purposes, and it was found that the device worked highly successfully.

"The circumstances which caused affiant, and the said Blood and Clinton, to clearly recall the date of first making and using this device, were as follows:

Affiant is secretary and treasurer of the Spokane Toilet Supply Co., of Spokane, Washington, and the said company constructed a new plant at 629-31 Erie Street Spokane, Washington, the building of which was started June 1st, 1913, and affiant was so completely occupied in attending to the construction of this new plant that he was unable to give his attention to the further operation of said invention until after the plant was completed on January 10, 1914.

"Immediately after the business of said company was successfully installed in said new plant on or about the last of January, 1914, affiant engaged a carpenter to construct the actual device shown in the attached photograph in order to show the same to the remaining owner of the company who is permanently located at Seattle, Washington, and who did not see the original device. The device now shown in the photograph is still in the possession of affiant.

"Affiant avers that he has telegraphed to the United States Patent Office an order for a certified copy of his aforementioned application and that the money has been deposited therefor in the United States Government Depository at the Old National Bank, Spokane, Washington, and that the aforementioned averments constitute all that is pertinent for the hearing now before this Honorable Court; and further, affiant avers that said certified copy will show the actual sketch which the Honorable Commissioner of Patents accepted as proof, in lieu of the lost original device, and further, that the certified copy will show the citation of the said Brown patent as a reference against affiant and will

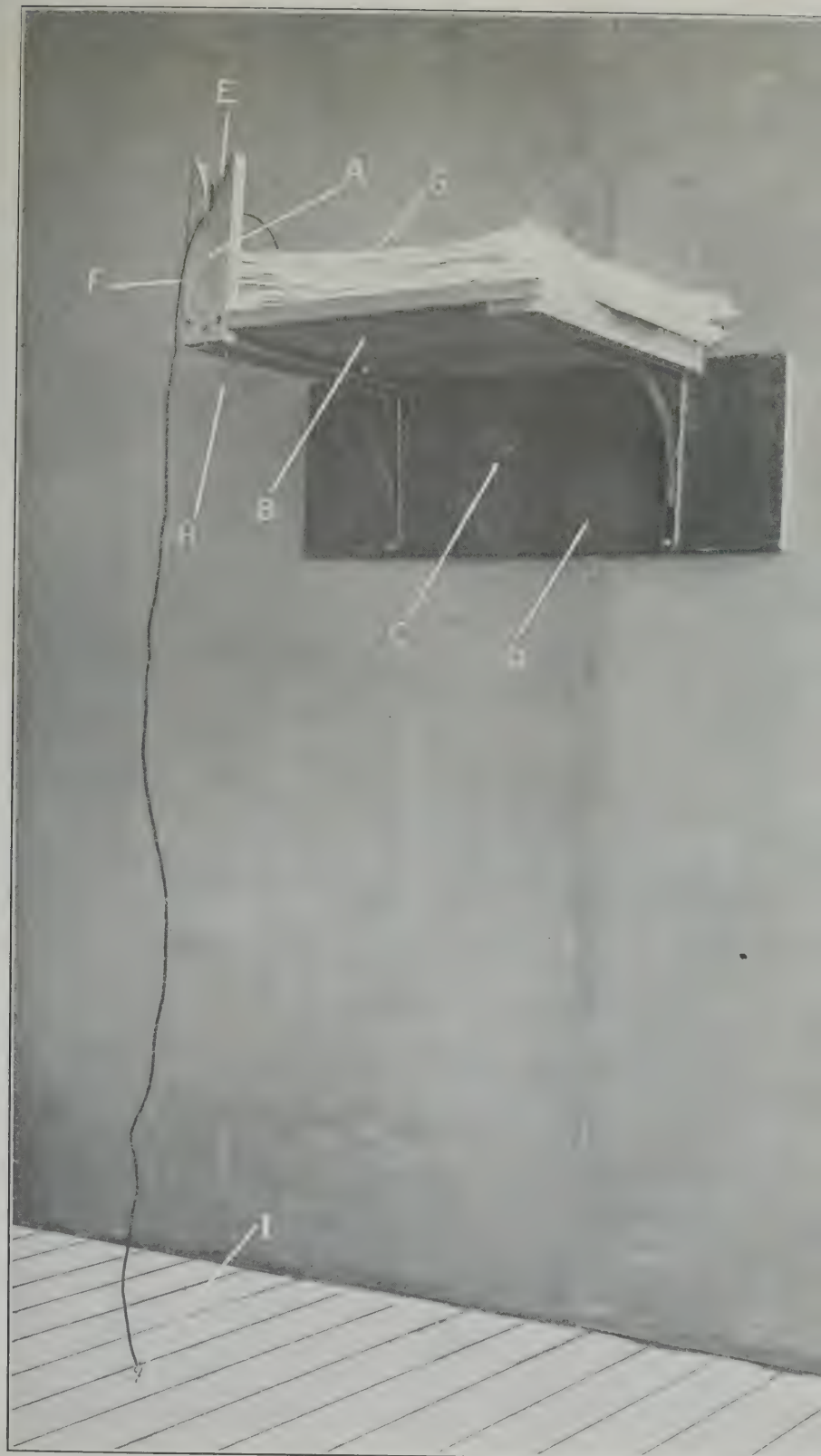
also show the withdrawal, subsequently, of said Brown patent in view of the aforesaid proof, further affiant saith not."

"GEORGE W. BLOOD, being duly sworn, doth depose and say that he knows Henry A. Ammann, and that he has been acting in the capacity of foreman for the above Henry A. Ammann in the Spokane Toilet Supply Company's plant for over three years preceding the date hereof.

"That affiant has carefully read the affidavit of the said Ammann, executed the 8th day of April, 1916, and affiant avers that he was present when the first device was tried out, and that photograph correctly shows the device as installed and tried out in accordance with the said Ammann affidavit; that affiant was also present when the device in the photograph was tried out, and affiant avers that to the best of his knowledge and belief that all of the statements made, and facts described in the said Ammann affidavit are true and correct; further affiant saith not."

"JOHN FRANK CLINTON, being duly sworn, doth depose and say that he knows Henry A. Ammann, and that he has been acting in the capacity of bookkeeper for Henry A. Ammann in the Spokane Toilet Supply Company's plant for over three years preceding the date hereof.

"That affiant has carefully read the affidavit of the said Ammann, executed the 8th day of April, 1916, and affiant avers that he was present when the first device shown in photograph was tried out, and that photograph



correctly shows the device as installed and tried out in accordance with the said Ammann affidavit; that affiant was also present when the device in the photograph was tried out, and affiant avers that to the best of his knowledge and belief that all of the statements made, and facts described in the said Ammann affidavit are true and correct, further affiant saith not."

Applicants also filed a motion for leave to file a supplemental answer, setting up the facts relating to said Ammann device, and also a patent issued to Jacques Roussio dated October 19, 1915, No. 1,157,046, granted on an application filed January 12, 1912; being the same party to whom a design patent was issued April 9, 1912, No. 42,398, cited by the Patent Office against said application for patent of Brown for the patent in suit; that the petition praying leave to file this supplemental answer alleged "that when defendants' answer was filed they had only such knowledge with respect to the state of the art as disclosed by the patents issued in the art."

"That as defendants had only just ascertained, when they filed their answer in this suit, that there were pending in the United States Patent Office two applications for letters patent on behalf of two other inventors, whose inventions were and are prior to the alleged invention of Brown described in the patent in suit, and one of said inventions apparently dominating all types of towel racks of the kind in question. That, therefore, said inventions and the letters patent issued thereon have a material bearing on all issues involved in this cause * * *'' (Trans. 48).

“Therefore, defendants prayed for leave to file a supplemental answer herein, alleging the facts above narrated * * * and further prayed that they be permitted to prove the facts above referred to * * * and for such other and further relief in the premises as to the court may seem meet.”

Annexed to the petition was the proposed supplemental answer which set forth the facts referred to in due form. (Trans. 53.)

The court, after considering the matter, denied appellants' motion to vacate said supplemental decree (Trans. 57), also denied their petition for leave to file said supplemental answer (Trans. 58).

Appellants, believing themselves aggrieved, thereupon entered their appeal from said supplemental decree, and also from said order refusing to dissolve the same, assigning as the errors of the District Court in such proceedings the following: (Trans. 59.)

I.

The District Court erred in finding the towel rack (designated on this appeal, Exhibit A) adopted by defendants after the interlocutory decree herein entered January 31, 1916, to be covered by the patent in suit, and extending and continuing the injunction of said decree to said towel rack by the entry of said supplemental decree on March 21, 1916.

II.

The District Court erred in entering the order of April 17, 1916, denying the motion of defendants to

dissolve and vacate said supplemental decree, and in refusing to take all the proofs of the parties either before itself, or the Master, regarding the premises.

III.

The District Court erred in entering said supplemental decree in the course of summary contempt proceedings, notwithstanding the court had previously and in conformity with said interlocutory decree appointed a Master for ascertaining and reporting the use by defendants of the invention covered by the patent in suit, and the proceedings before such Master were pending at the time; and that in consequence defendants were taken by surprise, had no opportunity of presenting their defense, and were deprived of their substantial rights in the premises.

IV.

That the proceedings of the District Court with respect to said towel rack were erroneous, and not in accordance with the usual and better practice of courts of equity in the premises, for it compelled the defendants to defend their rights in the premises piecemeal, and in so doing imposed upon defendants unnecessary and avoidable expense.

V.

That the District Court erred in refusing to permit defendants to prove the undenied facts alleged in the papers on which defendants moved to dissolve and vacate said supplemental decree, and which facts showed that said towel rack anticipated the invention purported

to be covered by the patent in suit; and the District Court's said acts deprived the defendants of their substantial rights in the premises.

VI.

The District Court erred in not finding that, on the undenied facts shown by the papers on which defendants' motion to dissolve said supplemental decree was based, if said towel rack infringes the invention covered by the patent in suit, then, by reason of antedating said alleged invention, said patent is void.

VII.

That the entire proceedings of the District Court in the premises were erroneous and were to the prejudice of the substantial rights of the defendants, and resulted in an improvident use of the powers of said court.

POINTS AND ARGUMENT.

The *first question* to be discussed is—*what is the scope of the Brown patent?* This question having been fully covered in said companion case, the argument and authorities there presented will be copied into this brief to cover this point.

But the questions directly presented *on this appeal* are those predicated upon the *supplemental decree and the refusal of the court to dissolve the same.*

ARGUMENT ON THE SCOPE OF THE BROWN PATENT.

The Brown patent covers only a particular *functional* rearrangement of the prior Reid device. In each of the Brown claims this function is included and governs the particular co-operative arrangement of the towel-assembling post and the towel-stringing chain. This feature it was, Brown stated to the Examiner of the Patent Office, (see file wrapper, Trans. 109) "which in practice corrects the deficiencies of the subject matter of the several references"—among which the Reid patent was the most pertinent.

By this functional arrangement, Brown argued (Trans. 110) he obtained such distinctive advantages over the Reid device as to deserve a patent; and it was this feature alone which persuaded the Examiner to allow the Brown application for patent. Hence, *all claims of the latter were restricted to such particular feature, as above pointed out.*

Therefore under the law of patents, *THE FUNCTION of the elements, in the Brown patent claims, is the basis of their co-operative relationship.*

A patent is a contract between the public and the inventor (2 Rob. on Patents, 70, Sec. 481) and should be construed like any two-sided instrument, so as to get the intent of the grantor (the public) as well as of the grantee (the inventor). *American Roll Gold Leaf Co. vs. Coe Mfg. Co.*, 212 Fed. 720, 724, CCA 1st Cir., citing *McClain v. Ortmyer*, 141 U. S. 419, 424.

On the law governing combination patents, it is said in 1 Rob. on Patents, 385:

“In determining the identity of the combination the investigator meets and is required to answer the four following questions: I, what are its constituent elements; II, what are the essential qualities of each; III, what is the nature of its co-operative law; IV, what are the new intrinsic attributes resulting from the combination of the old.”

At page 388, Sec. 282, it is stated: “The identity of the combination requires identity of elements, of co-operative law, and of essential attributes.” (Page 389) “When *all* the elements are the same, identity depends upon *identity of co-operative law*.” (Page 395) “That unless the co-operative law of two combinations are the same, the combinations are distinct, notwithstanding the identity of their elements.” Citing a list of earlier cases, among them *Pattee v. Moline Plow Co.*, 9 Fed. 821, 834, holding that the “defendant *had the right to combine the same parts* as plaintiff had *so long as he did not use the same combination*.”

In 3 Rob. on Patents, sec. 292, page 95, it is stated: “The infringement of a combination patent therefore consists in the use or sale of any combination in which precisely the same elements, or their equivalents, are united under the same co-operative law. To make or use or sell a combination in which the same elements are definitely combined * * * is not an infringement.”

In *Rich v. Baldwin*, 133 Fed. 920, 923, the court said: “In order to establish the infringement of a mere

improvement of a machine, of former devices already in use for accomplishing the same result, the means must be substantially the same, operate the same way, and accomplish the same result."

In *Kenny Mfg. Co. v. J. L. Mott Iron Wks.*, 137 Fed. 431, 434, the court held that *Where it is shown that the field of invention was exceedingly narrow when the patentee entered it, his claim, in order to be upheld at all, must be limited to the feature shown and described.*

In *American Can Co. v. Hichmartt Asp. Canning Co.*, 137 Fed. 86, 90 (Cal. 1905), Judge Morrow remarked: "To sustain a claim of infringement of a patented machine, three things must be found, first identity of result, second, identity of means, and third, identity of operation."

In *Lieberman's Exe'rs v. Rueell*, 165 Fed. 208, 210, the Court said: "*Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device, and receives little aid from the doctrine of equivalents.* If he depends upon a single limited feature (as in the case here) the doctrine will not ordinarily be applied so as to cover a device in which that feature does not appear."

In *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed. 916, 923, CCA 8th Cir., the court says: "To sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained, (2) the means of attaining that result, and (3) the man-

ner in which the different parts *operate and co-operate* to produce that result. If the devices are substantially different in either of these respects a charge of infringement is not sustained."

In *Kokoma Fence Mach. Co. v. Kinselmans*, 189 U. S. 8, 24, Chief Justice Fuller remarked: "We * * * agree with the (Circuit Ct.) in the conclusion that the machine lacks that identity of means and identity of operation which must be combined with the identity of result in constituting infringement."

In the case at bar, the District Judge said, in his opinion, (Trans. 15) "*The claims of complainant's patent, it must be conceded, are subject to narrow construction.*" "And during the trial, the court remarked (Trans. p. 77) "This is a very narrow issue, you (appellants) claim that you are using more nearly the Reid device than you are the Brown device."

What MIGHT be done with appellants' towel rack is not the question.

Reid *might* have arranged his chain like that of Brown. Indeed, by merely moving the lower end of his towel-stringing chain close to the bottom of the shelf, and there fastening it on the wall, he obtained substantially the same result, with respect to convenient use of towels, as Brown does.

That which infringes if later, will anticipate if earlier. (*Knapp v. Moss*, 150 U. S. 221, 228; *Miller v. Eagle*, 151 U. S. 186, 203.)

That an invention which would not anticipate will not infringe, see *Cook v. Sandusky Tool Co.* (4 Sup.

Ct. Rep. 4; 28 L. Ed. 124; 26 O. G. 1114), where it is stated "If the hoe made * * * infringes the patent of the appellant, it was an anticipation of the invention. * * * If it is not an anticipation, it is not an infringement."

"That a device which, if existent before the making of patented invention, would not anticipate it, cannot, if made after the issue of the patent, be said to infringe it." See *Cleveland v. Chicago*, 135 Fed. 783.

Therefore, *only that which would anticipate, if earlier, will infringe if later*. In other words, there is **BUT ONE STANDARD** to apply to the question as to the bearing of **WHAT MIGHT BE DONE** with one device as compared with another.

The rule of law which governs this question has been frequently applied on alleged anticipations.

The U. S. Supreme Court decided, in *Topliff v. Topliff*, 145 U. S. 156, 161, "It is not sufficient to constitute an anticipation that the device relied upon *might*, by modification, be made to accomplish the same *function* performed by the patent in question, *if it were not designed* by the maker, nor adapted *nor actually used* for the performance of such function."

In *Dederick v. Cassell*, 9 Fed. 309, the court said: "It will not answer to say the combination required no invention, that any mechanic might have selected the parts and combined them. The same might be said with equal force in almost every instance in which a patent for combination is issued."

This is the rule also recognized by the Court of Appeals of this Circuit, in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, 284, the court said: "A device which does not operate on the same principle cannot be an anticipation." (page 285) "It is not sufficient to constitute anticipation that a device relied upon what might, by a process of modification, reorganization or combination with each other, be made to accomplish the function performed by the device of the patent sued on."

Since what MIGHT have been done would not bar the granting of a patent, neither will what might be done by the alleged infringer with his device, BUT WHICH HE DID NOT DO, constitute him an infringer.

Counsel for appellee, in the Patent Office, in order to obtain favorable action there asserted the rule (file wrapper, Trans. 115) "*It is scarcely necessary to argue that grounds of rejection of a claim and a defense against infringement are in all respects identical.*"

ARGUMENT ON SUPPLEMENTAL DECREE

(a)

The supplemental decree was improvidently granted and should have been vacated on appellants' motion by the District Court.

This view in the premises is strongly suggested in the disposition by C. C. A. of the 2nd Cir. of a similar question in the case of *Louis Metzger & Co. v. Berlin* 194 Fed. 426.

At the time the supplemental decree was granted, in the case at bar, there was outstanding an injunction, under the interlocutory decree, which was as effective as any to be predicated on said supplemental decree, with respect to restraining the defendants from using any and all devices infringing upon the patent in question. After the accounting had once proceeded, it should not have been interrupted for the purpose of having the District Court summarily, as by the contempt proceedings complained of, pass upon the question of infringement with respect to devices not produced and passed upon at the time of the trial of this cause.

As was said in the case just referred to:

"The Master is bound to pass upon the question of infringement as to all devices brought before him on accounting and when his report is filed the court can review his findings, and all the devices presented to him, which are claimed to infringe, can then be passed upon by the court. And after the final decree an appeal can then be taken to this court, and a review of the findings of the court and master obtained."

This is *the orderly and logical way* of proceeding. *Any other mode is an attempt to dispose of the question of infringement* concerning the different devices *piecemeal*; and indeed the proceedings in the case at bar had the effect of compelling appellants, in defending their rights in the premises, to have each device they were using passed upon separately. Such practice should be disavowed and discountenanced. The supplemental decree should be reversed and vacated “as an improvident exercise of the court’s power,” as said in the case last referred to.

(b)

But we have not merely to deal with the form of procedure, though even in such the appellants were put to great and unnecessary expense. We have also to deal with the substance in the questions presented. The entry of the supplemental decree was unwarranted on the facts admitted of record, and deprived appellants of their substantial rights in the premises, for appellants were using the Ammann device under a license from the latter. And Ammann, by the affidavit of himself, Blood and Clinton, declared that he had invented his invention PRIOR to that of the Brown device. He also introduced, by photograph, as an exhibit of his affidavit, the very earlier model which he had made, and which is identical in all respects with the device declared by the District Court to be an infringement on the Brown patent claims.

Since, under the well known rule of law, *that which infringes, if subsequent, anticipates if prior, the state-*

ment by *Ammann* under oath, corroborated by his wit-

The prima facie date of an invention shown in a patent in suit is the date of filing of application.

Corbett Bros. Co. vs. Reinhard-Meding Co., 166
Fed. 767, 768.

Electric Controller & Supply Co. vs. Westing-
house Electric & Mfg. Co., 171 Fed. 83, 87, C.
C. A. 6th Cir.

Drewson vs. Hart Paper Mfg. Co., 131 Fed. 734,
739, C. C. A. 6th Cir.

The patent application of Brown was filed August 13, 1913.

The affidavits of *Ammann*, Blood and Clinton establish, prima facie, the fact that *Ammann USED*, therefore had completely invented, *his device prior to June 15, 1913.* (Trans. 42.)

Where an anticipatory device is shown to have been *in use prior to the application for a patent, the burden rests upon the patentee to carry the date of his invention back to a time ante-dating such use by satisfactory and convincing proof.*

Torrey et al. vs. Hancock, 184 Fed. 61, 67, C. C.
A. 8th Cir.

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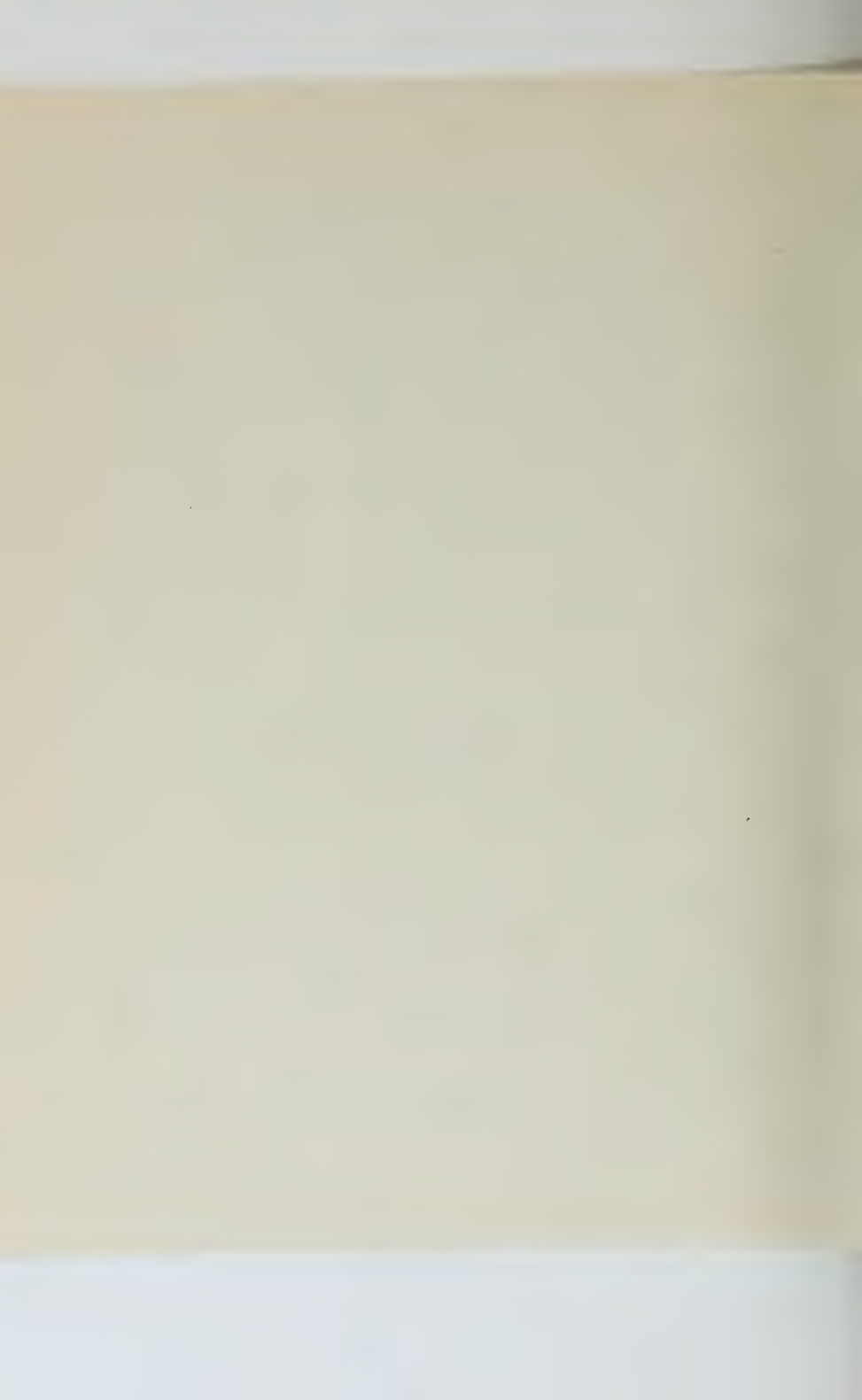
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Torrey et al. vs. Hancock, 184 Fed. 61, 67, C. C. A. 8th Cir.



ment by Ammann under oath, corroborated by his witnesses, that he invented his device prior to the Brown device, was a challenge to Brown, which attacked the very foundation of the latter's claims. Nevertheless this challenge was left unanswered by Brown, or appellee. Hence the assertion of Ammann and his witnesses is admitted by the silence of appellee, because the circumstances demanded that the latter should speak.

It was further admitted of record that Ammann was going to obtain a patent on his device, notwithstanding the Brown patent, although the latter had at first been cited against his application. This Ammann application has since gone to patent and now exists as a public record; his patent having been granted May 9, 1916, No. 1,181,983, as appellants are prepared to prove by certified copy of this patent, ready to be presented in court on the hearing of this appeal. A printed copy of this patent is included as an appendix to this brief. Such grant to Ammann raised a *presumption of there being a substantial difference* between the two devices. *Kokomo Fence Co. v. Kitselman*, 109 U. S. 8.

In view of the presumptions of record referred to, in favor of Ammann with regard to the dates of invention, appellee, by convincing the District Court that the Ammann device is an infringement on the later Brown patent, at the same time *proved HIS OWN INVENTION VOID for the Ammann device was invented first.*

Appellee's counsel in the District Court solemnly declared the Ammann device to be an infringement of the Brown patent. See Affidavits of Allen, Clancy and Burg, Trans. 32, 34, 36; also statement of appellee's counsel before the Master, Trans. 39.

Indeed it may be said that *appellee having assumed in the District Court a definite position in regard to the bearing of the Ammann and Brown devices upon each other, is now bound and must take the consequences.* And the rule of law so invoked would seem to dispose of the whole question before this appellate court, and require the reversal of the proceedings of the District Court; nevertheless, appellants frankly admit that they cannot agree with the contentions of appellee in the District Court, nor the views of the latter in these matters.

(c)

The Ammann device is not an infringement.

The contention of appellants always has been, and still is, that the Ammann device does not contain the same elements as the Brown device, nor is intended to operate, nor do its elements operate and cooperate as in the Brown device.

Referring to the Brown device, *where in the Ammann device are the elements specified in the combination set forth in claim 1 of the Brown patent? Or where those specified in claims 2 or 3 or 4 of the latter?*

It is well settled that *the omission of an element of a combination*, without substituting therefor its clear

mechanical equivalent, *renders the device non-infringing*. *Acme Truck Co. v. Meredith*, 183 Fed. 124, 127 (C. C. A. 8th Cir.), citing numerous authorities.

In *Eames v. Godfrey*, 1 Wall. (U. S.) 78, 79, it is said, in defining a combination, "the end in view is proposed to be accomplished by the union of *all* arranged and combined together in the manner described; the use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement or connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts.

However, this phase of the *law governing patents on combinations* is so elementary that it requires no citation of authorities.

(d)

With regard to the refusal of the District Court to permit appellants to introduce a supplemental defense, while of course discretionary, nevertheless under the circumstances here shown was a grave error.

If the Ammann device had any bearing on the issues triable in the court below, the appellants should have had a fair opportunity to present all those facts which were brought to their knowledge after they had answered the bill in this case, and the case had been tried on the issues so presented.

Bearing in mind that the record shows that the question of alleged infringement of the Ammann de-

vice was not introduced until after the trial of this cause, also that the appellants acquired the use of this Ammann device in good faith, and under the license of its inventor and patentee, it cannot be fair to permit one party summarily to found a new charge, on new matter, and refuse to the other a fair and full opportunity to refute such charge.

In this view surely *the refusal* of the District Court to permit appellants leave to introduce a supplemental answer and proof *was not in accordance with the principle and practice of a court of equity*. Furthermore, appellants should have had the opportunity of pleading and proving the facts concerning the patent issued to Jacques Rousso, October 19, 1915, No. 1,157,046, a public record, a certified copy of which appellants are also prepared to produce in this court on the hearing of this appeal; a printed copy of such patent being included as an appendix to this brief. Note the padlock shown in the drawings of this patent.

The application for the Rousso patent was filed January 12, 1912, more than a year before the application for patent in suit. Therefore, Rousso is presumed to be the earlier inventor. And such presumptions was confirmed by the silence of Brown. All these material facts appellants sought to introduce as soon as they became aware of same; and they should have had a fair opportunity of presenting them by supplemental pleading and proof.

It is submitted that the Seventh Assignment of Error (Trans. 61) is well founded:

“The entire proceedings of the District Court in the premises were erroneous and were to the prejudice of the substantial rights of the defendants * * *”

The supplemental decree, and the order refusing to vacate the same should be reversed, with the instruction of this court in the premises.

Respectfully submitted,

T. J. GEISLER,

Of Counsel for Appellants.

PATENT TO J. ROUSSO
October 19, 1915, No. 1,157,046

1,157,046.

Patented Oct. 19, 1915.
3 SHEETS—SHEET 1.

Fig. 1.

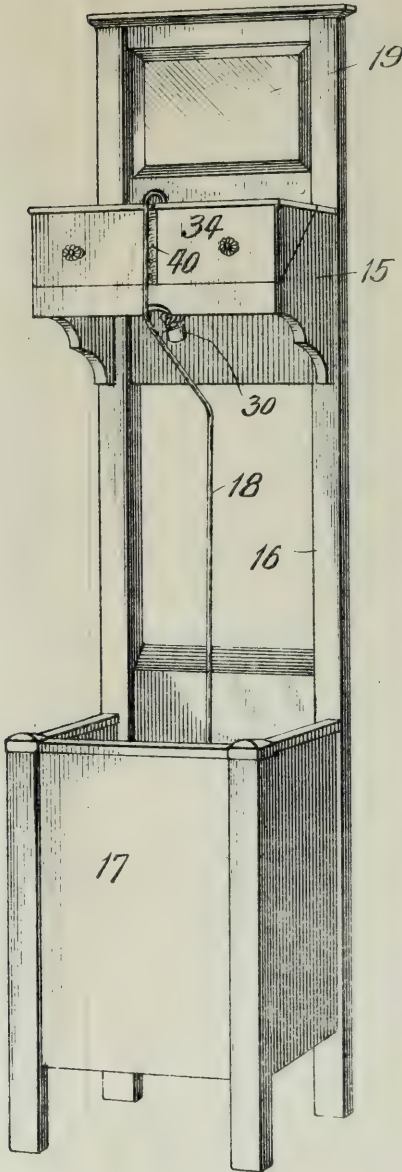
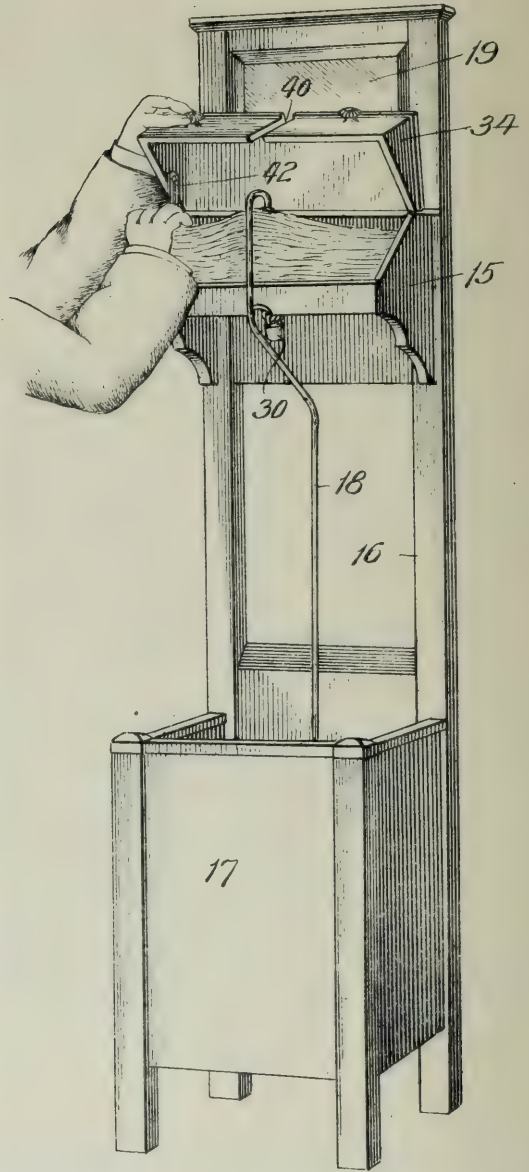


Fig. 2.



Witnesses:

John Enders

Henry A. Parks

Inventor:

Jacques Roussio,

by Sheridan, Wilkerson, Scott & Richmond,
Attys.

1,157,046.

Patented Oct. 19, 1915.

3 SHEETS—SHEET 2.

Fig. 3.

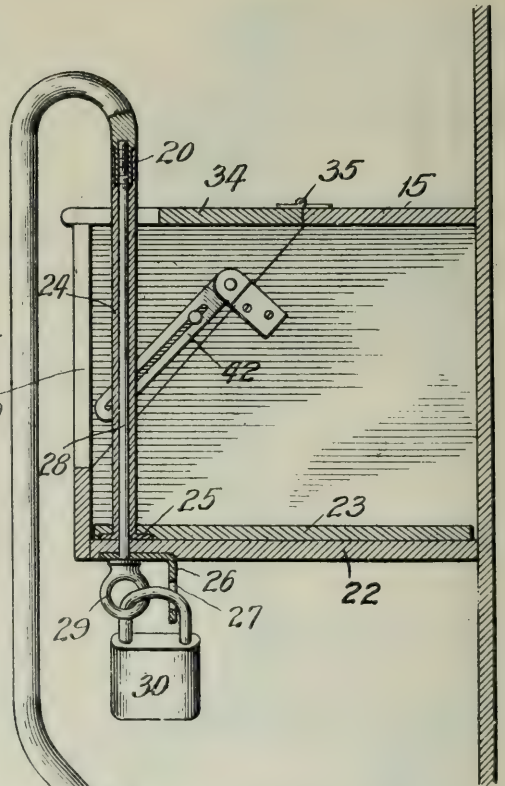
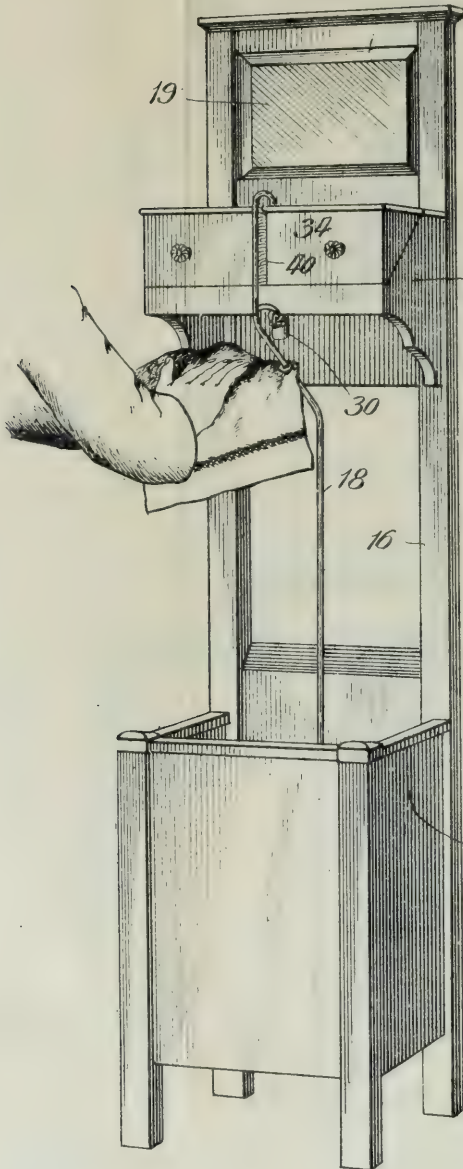
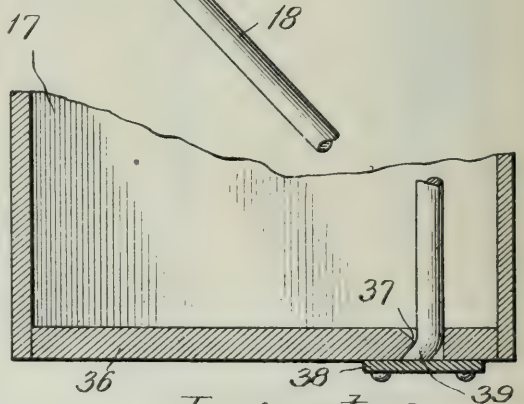


Fig. 4.



Witnesses:

John Enders

Henry A. Parks

Inventor:

Jacques Rouso,

by Sheridan Wilkinson, Scott & Richmond,
Attys-at-L.

J. ROUSSO.
TOWEL CABINET.
APPLICATION FILED JAN. 12, 1912.

1,157,046.

Patented Oct. 19, 1915.
3 SHEETS—SHEET 3.

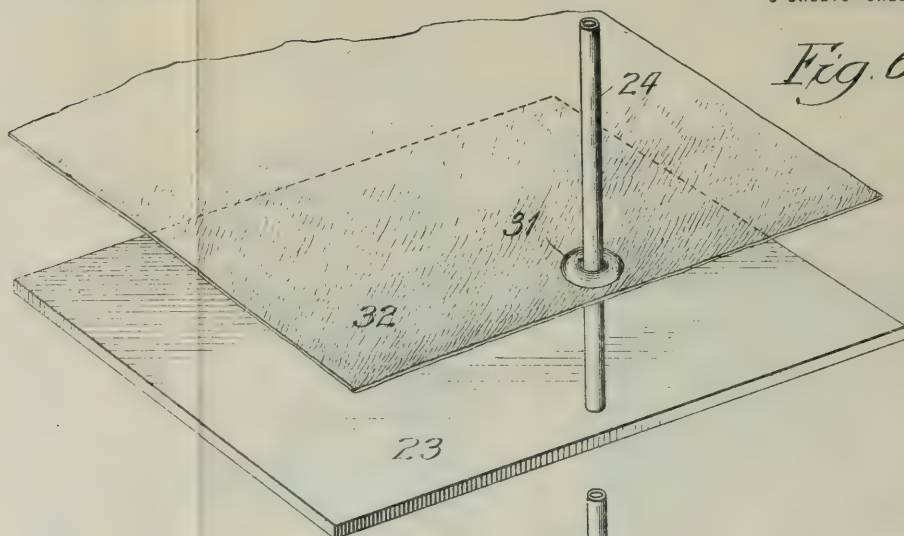


Fig. 6.

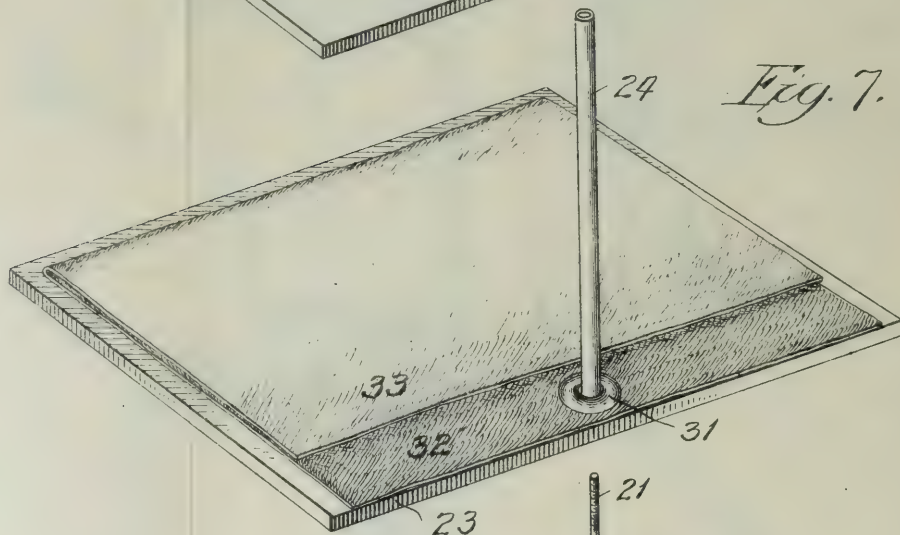


Fig. 7.

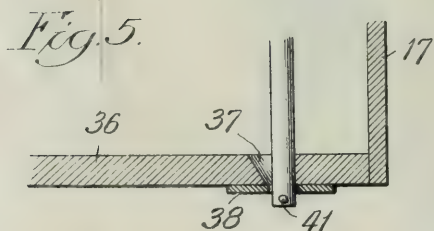


Fig. 5.

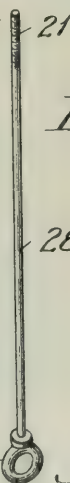


Fig. 8.

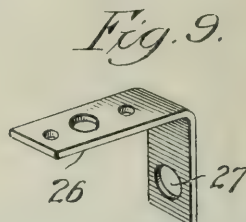


Fig. 9.

Witnesses:
John Enders
Henry A. Parks

Inventor:
Jacques Rouso,
by *Sheridan, Wilkinson, Scott & Richmond,*
Attys

UNITED STATES PATENT OFFICE.

JACQUES ROUSSO, OF CHICAGO, ILLINOIS.

TOWEL-CABINET.

1,157,046.

Specification of Letters Patent.

Patented Oct. 19, 1915.

Application filed January 12, 1912. Serial No. 670,776.

To all whom it may concern:

Be it known that I, JACQUES ROUSSO, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Towel-Cabinets, of which the following is a specification.

The principal object of my invention is to provide a new and improved device for supplying towels for public use.

Another object of my invention is to provide apparatus by which individual towels can be supplied successively to respective users.

These objects and others will be understood and appreciated, in connection with the following specification and claims, taken with the accompanying drawings.

In these drawings I have shown one specific embodiment of my invention, but the invention itself is defined in the appended claims.

I now proceed to describe this specific embodiment of my invention, and referring to the drawings—Figure 1 is a perspective view of the apparatus in its normal condition. Fig. 2 is a similar view showing the cabinet opened up as it would be for the purpose of taking a towel out for use. Fig. 3 is a similar view showing a towel out in position for use. Fig. 4 is a vertical section. Fig. 5 is a detail sectional view showing a modification. Figs. 6 and 7 are perspective views of a detail element showing a towel in its relation thereto. Fig. 8 is a perspective view of a locking rod. Fig. 9 is a perspective view of a latching element.

The apparatus comprises a box 15 to contain clean towels, standards 16 supporting this box, an open receptacle 17 to receive soiled towels, and a rod 18 on which the towels are at all times strung. Above the box 15 for the clean towels is a mirror 19. The rod 18 has its upper end slightly reduced, as indicated by the reference numeral 20, and a screw threaded socket 21 is formed in this end of the rod 18. On the bottom 22 of the box 15 lies a removable pallet 23 carrying a series of gromets 24 securely supported by the box 15. On the underside of the box 15, a plate 25 of the box 15 is attached a cover plate 26 with one end bent down and on the 27 formed therein. The rod 28 has at its lower end designated 29 and its upper end screws into the socket 21. The pallet 23 engages

the two eyes 27 and 29 and thus holds the rod 28 from being unscrewed.

Each towel 32 has a gromet 31 around the edges of a hole in one side of the towel and these gromets are strung on the sleeve 24, as shown in Fig. 4. Each towel is folded once, the free edge lying on top of the end carrying the gromet. This free edge of the upper towel is designated 33 in Fig. 4.

The box 15 has a cover 34 hinged at 35 and shown in open position in Fig. 4. The cover 34 is slotted to accommodate the rod 18, as indicated by the reference numeral 19.

The bottom wall of the soiled towel receptacle 17 is designated by the reference numeral 36. This has a hole 37 there-through, one side of the hole being cut away above and below, as indicated in Fig. 4. The hole 37 is closed below by a plate 38. The lower end of the rod 18 is bent forward, as indicated by the reference numeral 39, and in the normal relation of the parts this end 39 of the rod 18 hooks into the under cut-away space of the hole 37.

The alternative construction shown in Fig. 5 simply provides a hinge 41, the axis of this hinge being transverse so that the rod 18 can be rocked forward on this hinge without being lifted up.

In normal condition the parts will be assembled as shown in Figs. 1 and 4 with a considerable number, say fifty, of clean towels piled within the box 15 upon the pallet 23, all these towels being strung with their gromets on the sleeve 24 that stands up from the pallet 23, and each towel being folded with its free end 33 uppermost. A person desiring to use a clean towel will step up in front of the apparatus in a position facing the mirror 19 and with one hand will raise the cover 34 to the position shown in Fig. 2. The extent to which the cover can be raised is limited by the stop 42, so that when he lets go of this cover 34 it will fall back to closed position by its own weight. The cover being raised by one hand, as just stated, the user of the apparatus will reach into the box 15 with his other hand and seize the free edge 33 of the uppermost towel, drawing it up and forward. This will pull the rod 18 inward forward to the most forward part of the rod 18, the gromet 31 sliding along on the rod. Then the user will permit the cover 34 to drop back by its own weight to closed position, the towel being in the position shown in Fig. 3 of the draw-

ings. While in this position the towel can be used either on the face or the hands, and finally when the user is through with it he lets go of it and it falls down into the receptacle 17, the gromet 31 all the time sliding along on the rod 18.

If several persons, say two or three persons, desire to use clean towels at the same time, they can do so, one of them standing a little at one side of a position directly in front of the apparatus, and another standing a little at the other side, each one using his individual towel at the same time as the other or others.

As the towels accumulate in the receptacle 17 they remain always strung with their gromets on the rod 18 and the parts being locked in place by the padlock 30, it is impossible for any person to steal any of the towels.

When it is desired to replenish the box 15 with clean towels, this is done by removing the padlock 30, unscrewing the rod 28 and pulling it down and out. Then the upper reduced end 20 of the rod 18 can be sprung up a little out of the sleeve 24 and then the rod 18 can be swung forward. This movement will swing the lower end 39 of the rod 18 back so that it can be lifted up out of the hole 37. Thereupon all the soiled towels in the receptacle 17 will fall off of the lower end of the rod 18 or can readily be pushed off by the hand and removed for cleaning them. At the same time the pallet 23 can be lifted out of the box 15. If desired several pallets 23 may be kept on hand, each one piled up with the proper number of clean towels, and when one is removed, another can be instantly put in its place. Or, if desired, clean towels can be piled up on the removed pallet and it can be put back in the box 15 in the position shown in the drawings.

After the pallet supplied with clean towels has been put back in the box 15, the lower end 39 of the rod 18 is stuck down in the hole 37, then the rod is pushed back and its upper end 30 sprung into the socket in the upper end of the sleeve 28. Then the rod 28 is screwed in place and locked by the padlock 30. This brings the apparatus to normal condition ready for use, as already described.

It will be observed that the socket 37 and the coating end 39 of the rod 18 are so shaped as to prevent rotation of the rod 18 in said socket 37. This prevents swinging the forwardly projecting intermediate part of the rod 18 off to either side of its normal medial position. As an alternative construction the rod 18 may be hinged below, as indicated by 41 in Fig. 5, but in this case the soiled towels have to be removed by sliding them along the rod 18 and off the upper end thereof.

It will be seen that I have provided ap-

paratus by which a supply of clean towels can be kept on hand for instant use, that they may be withdrawn therefrom and used without inconvenience, and that at any stage they are retained by the apparatus and cannot be stolen.

The device as described may be supplemented by coin controlled mechanism, so that its use shall depend on the insertion of a coin in a slot.

I claim:

1. In a device of the class described, a towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

2. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently below said support to constitute a suitable guide for a towel while in use, substantially as described.

3. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support and then downwardly sufficiently below said support, said retainer being provided below said support with a substantially vertical portion of considerable length to constitute a suitable guide for a towel while in use, substantially as described.

4. In a device of the class described, an elevated towel support; and a retaining member extending upwardly from said support, then outwardly and downwardly sufficiently below said support, then inclined rearwardly and downwardly under said support and then downwardly substantially vertically to constitute a suitable guide for a towel while in use, substantially as described.

5. In a device of the class described, a towel support; and a retaining member extending upwardly from adjacent the outer edge of said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

6. In a device of the class described, a towel support; and a retaining member extending upwardly from adjacent the outer edge of said support, then outwardly and downwardly sufficiently below said support, then inclined rearwardly and downwardly under said support and then downwardly substantially vertically to constitute a suitable guide for a towel while in use, substantially as described.

7. In a device of the class described, a stationary support; a readily removable pallet resting on said support and adapted to serve as a carrier for perforated articles; and a retaining member extending upwardly

from said pallet then outwardly beyond and downwardly below said support and adapted to serve as a guide for perforated articles on said pallet; substantially as described.

5 8. In a device of the class described, a stationary support; a readily removable pallet resting on said support and adapted to serve as a carrier for perforated articles; and a retaining member extending upwardly
10 from said pallet, then outwardly beyond and downwardly below said support, said retainer being provided below said support with a substantially vertical portion of considerable length adapted to serve as a guide
15 for perforated articles on said pallet, substantially as described.

9. In a device of the class described, a frame, a shelf supported thereby, a pallet resting on said shelf, and a rod connected to
20 the pallet and extending upwardly therefrom, then forward and then down past the front edge of said shelf, said rod having a detachable joint at a point in the portion thereof that extends up from the pallet.

25 10. In a device of the class described, a frame, a box carried thereby, a rod having one end attached to the bottom of the box within the same near its front and extending
30 thence up then forward then down past the front of the box and back beneath the box, a hinged cover for said box having a notch in its forward edge to accommodate the said rod, and a receptacle underneath the box, the
35 receptacle and fastened to the bottom thereof.

11. In a device of the class described, two rectangular boxes supported one above the other, a removable pallet within the upper
40 box, a rod having one end carried by said removable pallet and extending upwardly therefrom, thence forward, down and under the upper box and into the lower box, said
45 rod being jointed at a point directly above its connection with said pallet.

12. In a device of the class described, a clean towel and a soiled towel box, a removable pallet within the clean towel box, a rod

extending upwardly from the upper side of said pallet and thence to the soiled towel
50 box, said rod consisting of a tubular standard with its lower end fixed on said pallet, a solid portion jointed to the upper end of said tubular standard and extending there-
55 from to the soiled towel box, and a fastening rod extending through the bottom of the clean towel box and through said tubular standard engaging the proximate end of the solid portion of the rod.

13. A towel dispenser comprising an up-
60 right support, a bracket mounted on said support and adapted to support a pile of towels placed one above another thereon, a locking device carried by said bracket, a rod
65 having a goose-neck formed on its upper end and adapted to engage said locking device, a loose towel-carrying sleeve adapted to telescope with one end of said rod and
70 pass loosely through eyelet holes in a series of towels to facilitate the placing of the towels on said rod, said sleeve normally resting on the support for said towels, the tow-
els slipping off the upper end of said sleeve as they are lifted from the top of the pile on the shelf, and a hamper provided beneath
75 said bracket and into which the lower end of said rod extends.

14. A towel dispenser comprising a sup-
port, a towel-supporting shelf mounted
80 thereon, a locking device mounted on said shelf, a rod having a goose-neck terminating in a downwardly projecting end that is adapted to overhang said shelf and engage
85 said locking device, the other end of said rod being inclined inwardly and downwardly from said goose-neck, and a hamper having an open top wherein the lower end of the downwardly and inwardly inclined
portion of said rod is secured.

In testimony whereof, I have subscribed my name.

JACQUES ROUSSO.

Witnesses:

SAM WOLF,

CARL A. RICHMOND.

PATENT TO HENRY A. AMMANN

May 9, 1916, No. 1,181,983

H. A. AMMANN.
TOWEL RACK.
APPLICATION FILED SEPT. 29, 1914.

1,181,983.

Patented May 9, 1916.

Fig 1

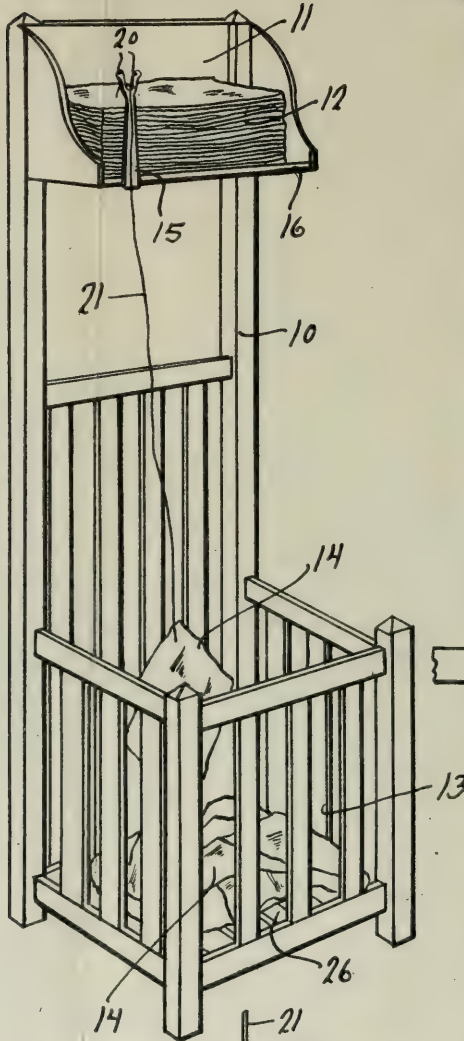


Fig 2

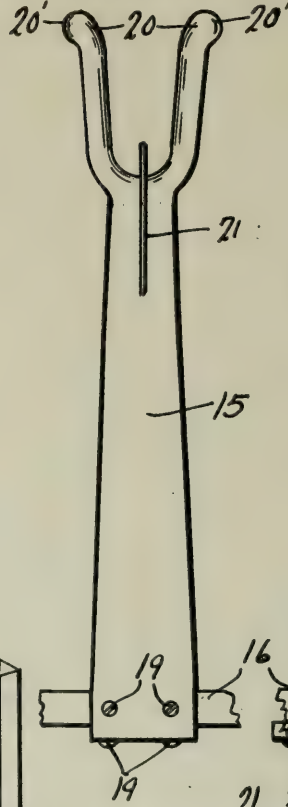


Fig 3

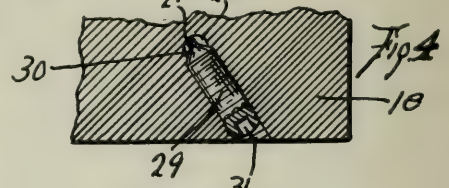
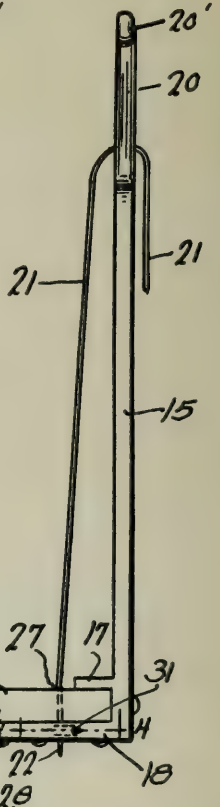


Fig 5

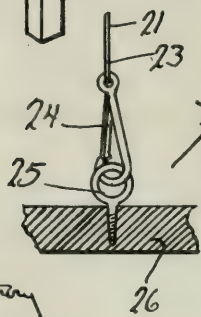
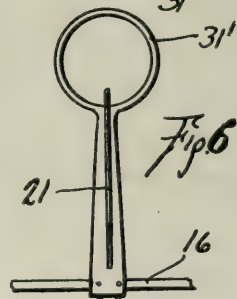


Fig 6



Witnesses

Harold Beaulieu
Edna Boyles

Inventor

By

Henry A. Ammann
Herbert E. Smith
Attorney

UNITED STATES PATENT OFFICE.

HENRY A. AMMANN, OF SPOKANE, WASHINGTON.

TOWEL-RACK.

1,181,983.

Specification of Letters Patent.

Patented May 9, 1916.

Application filed September 29, 1914. Serial No. 864,059.

To all whom it may concern:

Be it known that I, HENRY A. AMMANN, a citizen of the United States, residing at Spokane, in the county of Spokane and State of Washington, have invented certain new and useful Improvements in Towel-Racks, of which the following is a specification.

This invention relates to improvements in individual towel devices.

In accordance with my invention, a shelf or like support is provided on which clean towels are stacked, and an anchored flexible line or wire extends through the stack of clean towels, and away or downwardly from the latter, in such a manner that the clean towels may be withdrawn from the top of the stack along said flexible line to the desired point of use. In places where a receptacle is employed for the soiled towels, my invention contemplates extending the free end of the flexible line into such receptacle and providing such free end of the line with a suitable enlargement to prevent the soiled towels from stringing off from the free end of the line. It is also within the scope of my invention to anchor the free end of the line adjacent the bottom of the receptacle so that both ends of the line will be anchored, one end being preferably adjustably anchored so as to take up slack to the desired extent. My invention also includes an open guide for supporting an intermediate portion of the flexible line, preferably adjacent the top of the stack of clean towels, to prevent pulls and jerks on the line from shifting the clean towels out of a truly stacked form, and over which open guide the towels may be advanced along the flexible line to the point of use.

It is a special object of my invention to provide an all flexible line or wire on which the towels are strung in order to permit of clean towels being strung on the line or wire at the laundry, and delivered already strung, to the hotel rack or other place of use, thereby avoiding the delay to guests or customers incident to stringing the clean towels on a rod or chain fixed to the towel rack or shelf, at the time the clean towels are installed on the shelf or rack at the place of use. In this feature, my invention clearly distinguishes from such a structure as is shown in the patent to Albert C. Way, dated July 2, 1907, Number 858,931, wherein the rigid rod portions would preclude

delivery of clean towels already strung on the rod for attachment of the rod to the rack when the towels are delivered.

A further and very important object of my invention is to avoid the use of grommets or eyelets which have heretofore been deemed necessary, and I accomplish this object by using imperforate and wholly flexible towels and stringing the same on a line or wire which is also flexible. Thus the flexible line yields when the towel is pulled and jerked incident to use of the towel in wiping the hands and face, thereby preventing the formation of an enlarged hole in the ungrommetted towel which would inevitably result if an initially imperforate towel were strung upon a rigid rod incapable of yielding in response to the jerks and pulls imposed.

Another important feature consists in providing the flexible line with a sharpened pointed end which is readily forced through the imperforate towels to string the latter on the flexible line. Thus the towels coming from the mangle need not be assembled in predetermined order, as is necessary with grommetted towels, to dispose all the grommetted corners of the towels in superposed relation. The time involved in stacking towels is thereby greatly reduced by the use of this invention because the flexible line may be strung through any corner of any one of the towels or at any other point desired.

Further objects and features of the invention will be more fully described in connection with the accompanying drawing and will be more particularly pointed out in and by the appended claims.

In the drawing:—Figure 1 is a perspective view of my improved towel rack and attachment. Fig. 2 is a view in front elevation of one of the features constituting my invention. Fig. 3 is a view in side elevation of the structure shown in Fig. 2. Fig. 4 is a sectional view taken on line 4—4 of Fig. 3. Fig. 5 shows a means for attaching one end of my towel supporting wire. Fig. 6 shows a modified form of my invention.

Like characters of reference designate similar parts throughout the different figures of the drawing.

As illustrated my invention is applied to a rack designated generally at 10 and having compartment 11 for the reception of clean

linen 12 and compartment 13 to receive soiled linen 14.

A standard 15, which is preferably made of metal, is supported on the edge of rack board 16 by lugs 17 and 18 resting above and below 16, respectively. The rack board 16 forms substantially the bottom of the compartment 11. Standard 15 is attached to rack 16 by means of screws such as 19. The upper end of standard or prong 15 is forked as indicated at 20.

The towels 12 and 14 are threaded or strung on wire 21, the end 22 of which is sharpened as shown in Fig. 3. Permanently fastened to one end 23 of wire 21 is the snap hook 24 which is adapted to snap into the screw eye 25, which in turn is screwed into a bottom slat 26 of the compartment 13. The other end of wire 21 passes through the forked end 20 of standard 15 and through a suitable hole in rack board 16 as indicated at 27. Registering with a hole 27 is a hole 28 provided in lug 18, allowing the end 22 of wire 21 to be thrust down into the position shown in Fig. 3. The wire 21 is locked in this position by means of set screw 29, the end 30 of which will bear against 21. Set screw 29 is placed at the angle shown in Fig. 4 in order to be more accessible from the front of the rack. 29 will be operated by means of key wrench (not shown) which will be in the possession of authoritative parties only. The key wrench will fit into the socket 31 provided in the end of screw 29.

The method of supplying the rack and using the towels is as follows: A suitable number of clean towels will first be threaded in any desired manner on wire 21 and slid down until the first one strikes the snap hook 24 which will act as a stop. The long length of free wire remaining will then be wrapped around the bundle of towels to aid in transportation. When an empty rack is to be supplied the loose wire is unwound and end 22 thrust through holes 27 and 28 until it projects below 17 as shown in Fig. 3. The reason for thrusting 22 through so far is to prevent the set screw 29 from marring or otherwise damaging the sharpened point 22. Wire 21 will then be locked in position by set screw 29. The bundle of clean towels will then be slid from the snap hook and to the rack board 16 and wire 21 will be strung over the forked end 20 and the snap hook will be snapped into the screw eye 25. Sufficient slack will be left in wire 21 so that when it is desired to wipe one's hands the towels may be lifted and drawn over the wire 21 so that the corner of the towel may pass between the prongs 20. The slack in 21, however, will not be sufficient to allow wire 21 to be slipped over the ends 20' of 20. After the towel is soiled it is simply dropped and will slide down into section 13.

In the modified form of my invention, as shown in Fig. 6, a ring 31 is substituted for prong 20, the advantage of this construction being that the amount of slack in wire 21 is unlimited since it is impossible for said wire 21 to slip out of the ring. By allowing this additional slack in the wire it is possible to place a greater number of towels on the rack. The ring 31' will be about six inches in diameter so that the hand may be thrust therethrough and the clean towels drawn out.

It is my intention to provide the wires of such quality that they may be used over and over again. Now, while I have shown the wire 21 simply threaded through one corner of the towels it will be understood that I may insert metal eyelets to relieve the strain on the linen. However, I have found by long experience that by the time all four corners of the towels would be worn out by direct application of the wire, the rest of the towel would be unfit for use. Therefore due to the resulting saving in expense, I prefer to wire the towels without the use of eyelets.

It will be understood that I do not wish to be limited to the use of a wire as indicated at 21, as any form of line, such as a flexible cord or chain would perform the function equally well and therefore in the claims I have referred to the wire 21 as a flexible line.

It will be noted that the fork or prong 20 functions broadly as a guide of the open type, and by reason of the fact that it supports an intermediate length of the line or wire 21 adjacent the top of the stack of towels, the topmost towels of the stack may be lifted off and advanced along the line or wire 21, through the open guide, and then lengthwise or downwardly along the depending length of line or wire to the point of use. This guide therefore preserves the towels in stack form irrespective of the manner in which the line or wire 21 is drawn taut by manipulation of the towel resulting from its handling by the user. It will also be noted that the set screw 29 may engage the towel end of the wire or line at any desired point lengthwise thereof so as to thereby lengthen or contract the wire 21 in accordance with the elevation of the towel shelf above the basket, this being possible and also advantageous by reason of the fact that the purveyor of the device may employ a single stock of wire of a single length for towel racks of all sizes. Moreover, this adjustable feature permits of a sufficient slack of the wire to afford freedom of use and also avoid such slack as would result in the wire becoming free from the guide.

Because of the cost of providing the towels with eyelets and by reason of the fact that such metal parts greatly interfere with the process of laundering the towels, it has long been desired to avoid their use entirely in

connection of towels of this character. Furthermore, where eyelets are provided, a great deal of time is lost in stacking clean towels by reason of the fact that it is necessary to dispose the towels in a predetermined order with all of the eyelet corners in one corner of the towel stack. After the towels are stacked, that corner of the stack where the eyelets are located lies at a very material elevation with respect to the remaining corners of the stack because of the increased thickness of the eyelets and therefore the towel stack presents a very unsymmetrical appearance when disposed upon a public rack.

By means of my improved flexible line having a pointed end, I am enabled to use towels which are imperforate because of the fact that the towels are threaded upon the line by projecting the sharp end of the latter through the towels.

I also regard it as a very important feature of my invention to provide a flexible wire which not only functions as an attachment to the towel rack but which permits of the towels being strung and assembled into stack form at the laundry, and transported to the rack without again stringing the towels, the wire performing not only the function of an attaching device but also of a wrapping cord.

Applicant believes that he is the pioneer, in this art, in providing a stringer, which may be a flexible line, together with means coacting with the stringer and the towels strung thereon to hold the towels from unstringing, during transport of said strung towels from the laundry or like point, on the stringer, to a rack. So far as applicant is aware, he is the first to string towels at the laundry, and deliver such clean towels, already strung, for attachment to any desired rack or support at the point of use.

It is believed that the novelty and utility of the device of my invention will be fully understood from the foregoing description and while I have herein shown and described one specific form of my invention I do not wish to be limited thereto except for such limitations as the claims may import.

I claim:—

1. In a means for supporting and dispensing towels, a supporting rack, a fork extending at right angles to and attached to said supporting rack, a wire passing through the crotch of the fork, one end of said wire being sharpened and locked in the lower portion of said fork, and the other end of said wire being snapped to another portion of the supporting rack, substantially as described.

2. In a device of the class described, a towel holding wire, a fork over which said wire is trained, said fork having lugs extending above and below said supporting rack, means for attaching said fork to said

rack, means for locking said wire and said lower lug comprising a hole through which said wire passes, a set screw entering said lower lug at an angle less than ninety degrees with the edge of the lug, one end of said set screw pressing against the end of said wire and the other end of said set screw being socketed to receive a key wrench, substantially as described.

3. In a towel holder, a support for a stack of towels, a flexible line having a towel end strung downwardly through said stack of towels and anchored, the remaining length of said flexible line extending over the support and depending downwardly from the top of said stack of towels, and a guide loosely supporting an intermediate portion of said flexible line adjacent the top of said towel stack, said guide being open to permit of towels grasped from the top of the stack being advanced along said flexible line over said guide and downwardly along the depending portion of the line to the desired point of use, the terminal end of said depending flexible line having an enlargement to prevent the used towels from being strung off from said line, substantially as described.

4. In a towel holder, a support for a stack of towels, a flexible line having a towel end strung downwardly through said stack of towels, the remaining length of said flexible line extending over the support and depending downwardly from the top of said stack of towels, and a guide loosely supporting an intermediate portion of said flexible line adjacent the top of said towel stack, said guide being open to permit of towels grasped from the top of the stack being advanced along said flexible line over said open guide and downwardly along the depending portion of the line to the desired point of use, both ends of said line being anchored and one of said ends being adjustably anchored to afford sufficient slack of the line to permit of flexibility and freedom of use or to extend or contract the length of said line, but in all adjustments to restrict the length of line sufficiently to prevent disengagement of the line from said open guide, substantially as described.

5. In an attachment for towel racks of the character described, a flexible line having a perforating end for insertion through a stack of towels and said line being of sufficient excess length with respect to the height of the stack to be wrapped about the clean or soiled towels to form a package in transporting the towels to and from the rack, an enlargement on one end of said line to prevent the towels from stringing off from said line, and a rack structure having devices for attachment of both ends of said line whereby a clean stack of towels may be installed on said rack structure as originally

strung at the laundry, substantially as described

6. In an attachment for towel holders, a flexible stringer for insertion through an initially imperforate stack of clean towels at the laundry to hold the clean towels in strung form during transport of the clean towels and stringer to the place of use, and a towel support at said place of use having a device for attachment thereto of one end of the stringer with the clean towels strung thereon for withdrawal of the towels along the stringer toward the remaining end of the latter to the point of use, substantially as described.

7. As a means for assembling individual towels at a laundry for transport to the place of use, a plurality of flexible stringers, one each adapted to be forced through a stack of clean towels and upon any one of which a number of towels may be strung, said towels being initially imperforate and said stringers being of such small cross section as to merely displace the threads of the towel fabric rather than disrupt the towel fabric in passing through the towels to thereby prevent the formation of permanent openings in the towels, whereby the initially imperforate towels may be assembled in stack form a plurality of times without regard to the relative positions of those portions last strung with respect to adjacent towels of the stack to be formed, each of said stringers being provided with means whereby it may be attached to a towel stand, substantially as described.

8. In combination, a support for an initially imperforate stack of clean towels, a receptacle for the soiled towels, and a flexible line having a flexible portion strung through said clean towels and anchored, the remaining end of the line being anchored adjacent said receptacle whereby a towel may be taken from the stack and advanced lengthwise of said line to the point of use and then be deposited in said receptacle, substantially as described.

9. In combination, a support for an initially imperforate clean stack of towels, and a flexible line having a flexible portion strung through said initially imperforate towels and anchored, the remainder of the line being of sufficient length to extend away from the clean towels and form a guide along which the clean towels may be advanced from the stack to a suitable position for use, substantially as described.

10. In an individual towel attachment of

the class described, a towel rack for supporting initially imperforate clean towels in stacked form, a plurality of flexible stringers for said rack for transport with the clean towels strung thereon from the laundry to the rack and for transport with the soiled towels strung thereon from the rack to the laundry, and means for attaching or detaching said stringers to or from said rack, with the clean or soiled towels strung on said stringers, substantially as described.

11. In an attachment for towel racks of the character described, a flexible line having an end for insertion through a clean stack of towels, an enlargement on one end of said line to prevent the towels from stringing off from said line while the towels and said line are in transport from a laundry to the rack, and a rack structure for supporting the clean strung towels and having a device for attachment to one end of said line projecting from said strung stack of clean towels, substantially as described.

12. In a towel holder, a support for a stack of clean towels, a receptacle for the soiled towels, a flexible line extending through said stack of clean towels and being anchored, the remainder of the line extending into and being anchored in said receptacle, and means supporting an intermediate portion of said flexible line, substantially as described.

13. In an attachment for towel racks of the character described, a flexible stringer having a flexible stringer portion for insertion through initially imperforate clean towels at the laundry to hold such clean towels in strung form during transport of the clean towels with the stringer from the laundry to the place of use, and said stringer having an intermediate portion extending from said stringer portion, and a towel support at said place of use having a device for attachment of said stringer portion with the clean towels in collected form for advancement of the clean towels off from the stringer portion along the intermediate portion to the point of use, substantially as described.

14. As a means for assembling and packing clean initially imperforate towels in stack form at a laundry or like point, a flexible wire having a sharp end for insertion through initially imperforate towels and having sufficient length to be wrapped about the towel stack, substantially as described.

In testimony whereof I affix my signature.

HENRY A. AMMANN.

IN THE
**United States Circuit Court
of Appeals**

FOR THE
NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY,
a corporation, and
PERCY G. ALLEN,
Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,
Appellee.

*Appeal from the District Court of the United States
for the District of Oregon.*

APPELLEE'S BRIEF.

JOSEPH L. ATKINS,
of Counsel for Appellee.

T. J. GEISLER,
of Counsel for Appellants.

Filed

MAY 14 1917

F. D. Monckton,

Clerk ROYER PRINTING CO. PORTLAND

IN THE
**United States Circuit Court
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FOR THE
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CRYSTAL LAUNDRY COMPANY,
a corporation, and
PERCY G. ALLEN,

Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,

Appellee.

No. 2972

*Appeal from the District Court of the United States
for the District of Oregon.*

APPELLEE'S BRIEF.

INFORMALITY OF APPELLANTS' BRIEF.

In this case it appears that the Assignment of Errors on behalf of the Appellants fails to comply with the requirements of Rule 11 of this Court, and motion to dismiss upon that ground will be presented under provisions of Rule 21.

It also appears that no Brief, conformable to the requirements of Rule 24 of this Court, has been filed, and motion to dismiss upon that ground will also be presented.

It further appearing that certain matters not in evidence here have been included in the Transcript, and also that certain copies of patents not embraced within the certified Transcript, have been served upon counsel for Appellee, presumably with the purpose of attempting to present them before this Court in argument in this appeal, motion will be presented to strike from the record, and to disregard such matters, or so many of them as this Honorable Court may deem proper to exclude.

In view of the failure of the Appellants to present in their brief (a) a concise abstract or statement of the case, or (b) a specification of the errors relied upon, or (c) a brief of the argument in proper form, all as prescribed by Rule 24 aforesaid, it appears that Appellee's brief should, in accordance with Sec. 3 of the Rule, present, at the outset, a statement of the case, in which view the following is submitted.

STATEMENT OF THE CASE.

This is an appeal after decision and interlocutory and supplemental decrees in favor of plaintiff from the order of the court below denying motion to vacate the supplemental decree in a suit brought in the United States District Court, for the District of Oregon, by Brown-Meyer Company, hereinafter, in respect to its relationship fixed in the trial court, designated Plaintiff, against Crystal Laundry Company, a corporation, and Percy G. Allen, in like manner

designated Defendants, for the infringement of U. S. Letters patent, No. 1,115,895, granted to Brown - Meyer Company, as assignee of Charles F. Brown, under date of November 3, 1914, upon application filed by said Brown on August 13, 1913, for Improvements in Towel Holders. The device in suit, as indicated in the patent, is "one for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry, until such time as they are required, one by one, for use." Provision is also made for conveniently withdrawing the towels, one by one from the pile, for facilitating the manipulation of each while in use, and for securing them against accidental misplacement or intentional and unauthorized removal after use.

ANSWER ADMITS VALIDITY OF THE PATENT.

To the Bill of Complaint, Defendants made Answer in usual form, admitting the validity of the patent.

PRIOR STATE OF THE ART.

Answer sets up the prior state of the art to be that shown in letters patent of the United States, as follows:

N. S. Baldwin and E. S. Goodwin, Number 557,754, date Apr. 7, 1896.

J. G. Cooner, Number 908,076, date Dec. 29, 1908.

J. Rousso, Number 42,398, Des., date Apr. 9, 1912.

L. Straub, Number 1,038,984, date Sept. 17, 1912.

T. K. Taylor, Number 1,052,292, date Feb. 4, 1913.

G. Reid, Number 1,067,622, date July 15, 1913.

T. Heins and E. R. Galland, Number 1,078,501,
date Nov. 11, 1913.

At the trial, Defendants introduced in evidence copy of the File Wrapper and Contents of the patent in suit (Transcript pp. 104-120) and copies (not placed in printed Transcript (See Transcript p. 100) of the patents set up in the Answer, all of which were considered by the Patent Office in the examination of the application.

At the trial, also, particular stress was laid on the Reid patent, No. 1,067,622, Defendants' Exhibit 7. (Not paged in Transcript). The differences between the Reid device and that in suit are radical and obvious to one skilled in the art and acquainted with both. The Patent Office considered, along with others set up in the Answer, this patent in particular, and decided that the Reid patent, as well as the others, was not an anticipation of the patent in suit. To the allowance of the patent in suit over the Reid patent, attention of Counsel for Defendants was pointedly directed by the Court at the trial, and in response to the Court's reference thereto Defendants' Counsel says "and in that (action) the Patent Office, we will say, was correct" (See Transcript pp. 74-75).

INFRINGEMENT ADMITTED.

Said Answer furthermore admits (Transcript p. 11) Defendants' infringement of said patent from the date thereof to about November 30, 1914.

The fact of such infringement is also expressly admitted by counsel for Defendants in answer to question put by the Court (Transcript p. 67).

CHANGE ALLEGED TO AVOID INFRINGEMENT.

At the time last named Counsel alleges on behalf of Defendants that they made a change in their device by which he claims they avoid infringement. The language employed by Defendants' Counsel in referring to the alleged change is significant in that it admits continued use of the same device. In reply to the question put by the Court, "You are not using it, or have you changed it?" Defendants' Counsel replies: "We have changed it, your Honor." (Transcript p. 67).

In respect to the alleged change aforesaid in Defendants' device, admitted before such alleged change to have been an infringement of the patent in suit (Transcript p. 11), and to have been made about Dec. 1, 1914, W. C. H. Smith, Defendants' witness, who says (Transcript p. 80) he is one of the "partners" of the Broadway Towel Supply Company as he was in July, 1914, testifies, that when Defendants were required, by ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29270 (set forth in Transcript p. 85) to use a sanitary device, "The one I installed was the one

they (Plaintiff) had been using before I put ours in.” (Transcript p. 84).

CHANGE ALLEGED IS MERE CHANGE OF USE. INFRINGING DEVICE UNCHANGED.

The change referred to, made about Dec. 1, 1914 (Transcript pp. 71 and 83) was no change in the device at all. It consisted, according to Defendants’ witness, merely in temporarily disengaging the end of the chain from the lock and putting that to the end of the basket. (See next to last paragraph, p. 83, Transcript). The structure continued to be identical with that admitted in the Answer to be an infringement. Defendants persisted in using the same device until restrained by injunction.

COURT HOLDS INFRINGING DEVICE UNCHANGED.

His Honor, Judge Wolverton, decides (Transcript p. 15): “The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff’s, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff’s contrivance,” and that “defendants are infringing.” In reference to alleged change in Defendants’ device (Transcript p. 17) the Court says: “I am impressed that the alleged new device

is merely colorable and without potent variation such as will avoid infringement."

INTERLOCUTORY DECREE.

Upon the decision aforesaid "Decree for injunction and accounting" (Transcript pp. 17-20) was entered January 31, 1916.

CONTEMPT PROCEEDINGS.

While an accounting before John B. Cleland, Esq., a Special Master (See Transcript p. 20) was in progress, Plaintiff brought a "Motion to punish Defendants for Contempt" (Transcript pp. 20-24).

Defendants answering said Motion admit inadvertent use of a single towel rack. (Transcript pp. 24-27).

SUPPLEMENTAL DECREE UPON CONTEMPT PROCEEDINGS.

The cause having been heard in open court on contempt proceedings, His Honor Judge Wolverton, on March 21, 1916, made a Supplemental Decree, holding use of device before the Court (shown in cut inserted between pp. 38 and 39 of Transcript) in addition to that of one identical device covered by the original decree to constitute a continuing infringement (Transcript p. 29) and violation of the injunction, but condones the offense upon showing made.

MOTION TO VACATE SUPPLEMENTAL DECREE.

. Motion to vacate decree of March 21, 1916, was made under date of April 4, 1916 (Transcript pp. 31-32).

MOTION FOR NEW TRIAL.

Aforesaid motion to vacate decree was accompanied by another "Motion for leave to file Supplemental Answer" (Transcript pp. 46-47); by a "Petition for leave to file Supplemental Answer and take proofs thereon" (Transcript pp. 47-52); and by a "Proposed Supplemental Answer" (Transcript pp. 53-56), said "Petition" and "Proposed Supplemental Answer" being based upon alleged newly discovered evidence, to-wit: an alleged patent of the United States, alleged to have been granted Oct. 19, 1915 (over three months before Decree in suit was entered. (Transcript, p. 17) to one J. Rousso, and, also, an alleged pending application for U. S. Patent on behalf of one Henry A. Ammann, set up in previously denied "Motion to vacate Supplemental Decree of March 21, 1916." (*Vide, Supra*).

The foregoing motion, etc., appear to have no place on appeal, and are included in Appellee's motion to strike.

COURT DENIES MOTION.

Order Denying Motion to vacate Supplemental Decree of March 21, 1916, and fixing appeal bond on No-

tice of Appeal in open Court, is dated April 17, 1916. (Transcript pp. 57-58).

COURT DENIES PETITION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER.

Order dated April 17, 1916. (Transcript, pp. 58-59).

PETITION ON APPEAL AND ORDER OF ALLOWANCE.

Petition on appeal is directed against entering Supplemental Decree of March 21, 1916, and order of April 17, 1916, denying Motion to vacate same. (Transcript p. 62). Order allowing petition dated April 20, 1916. (Transcript p. 63).

ASSIGNMENTS OF ERROR. ARGUMENT.

In anticipation of the possibility that this Honorable Court may determine, upon hearing of motion, that Appellants are entitled to be heard upon some one or more of their Assignments of Error presented, attempt is hereinafter made to arrive at an understanding of the apparent or possible meaning of said Assignment of Error and to make herein reply thereto.

Before proceeding, however, to consider the Assignments of Error, *seriatim*, it is submitted that the peti-

tion on appeal (Transcript p. 62), lays but one ground for appeal, namely, the refusal of the Court below to vacate Supplemental Decree entered March 21, 1916.

Upon this point it would appear there can be no controversy, in view of the decision of the Supreme Court.

Discretionary rulings not subject to review. Vacating judgment discretionary and not subject for review.

Sun Cheong-Kee vs. United States, 70 U. S. (3 Wall.) 320.

The following is a review of the Assignments of Error, one by one:

I.

“The District Court erred in finding the towel rack (designated on this appeal Exhibit A) adopted by defendants after the interlocutory decree herein entered January 31, 1916, to be covered by the patent in suit, and extending and continuing the injunction of said decree to said towel rack by the entry of said supplemental decree on March 21, 1916.” (Transcript pp. 59-60).

The Court will hardly consider this assignment, since it is in glaring violation of the requirements of Rule 11 of this Court. It not only couples two distinct allegations of error, but it lacks particularity in many instances. For conspicuous example, it refers (line 2) to alleged “appeal Exhibit A.” No such exhibit is found in the record,

much less designated as the Rules require. The index makes no reference to any exhibits except in list p. 103 of Transcript, wherein the patent in suit appears as "Plaintiff's Exhibit A." There are two different paper exhibits in the Transcript, both marked simply "Exhibit A." Neither is marked "Appeal Exhibit A." Here is confusion thrice confounded, and inextricable.

II.

"The District Court erred in entering the order of April 17, 1916, denying the motion of defendants to dissolve and vacate said supplemental decree, and in refusing to take all the proofs of the parties either before itself, or the Master regarding the premises." (Transcript p. 60.)

Assignment II is indefinite and couples two distinct allegations of error, to-wit, denial of Defendants' motion to vacate supplemental decree *and* refusing to take certain proofs. Neither alleged error involves the other.

It is, moreover, an appeal from a motion to vacate which is not reviewable.

Vide Supra, 70 U. S. 320.

III.

"The District Court erred in entering said supplemental decree in the course of summary contempt proceedings, notwithstanding the Court had previously and

in conformity with said interlocutory decree appointed a Master for ascertaining and reporting the use by defendants of the invention covered by the patent in suit, and the proceedings before such Master were pending at the time; and that in consequence defendants were taken by surprise, had no opportunity of presenting their defense, and were deprived of their substantial rights in the premises." (Transcript p. 60).

This assignment, involved and indefinite, appears to negative the power of a District Court of the United States to control its own procedure in contempt proceedings. In the absence of any authority to support or indeed any reference to the assignment, such a proposition would appear to be a palpable *reductio ad absurdum*.

IV.

"That the proceedings of the District Court with respect to said towel rack were erroneous, and not in accordance with the usual and better practice of courts of equity in the premises, for it compelled the defendants to defend their rights in the premises piecemeal, and in so doing imposed upon defendants unnecessary and avoidable expense." (Transcript p. 60).

This assignment is impossible to deal with in its indefiniteness and wholesale condemnation (without specification of any particular error) of the "proceedings of the District Court" (line 1).

V.

That the District Court erred in refusing to permit defendants to prove the undenied facts alleged in the papers on which defendants moved to dissolve and vacate said supplemental decree, and which facts showed that said towel rack anticipated the invention purported to be covered by the patent in suit; and the District Court's said acts deprived the defendants of their substantial rights in the premises. (Transcript, p. 61.)

Merely a re-statement in other words of Assignment II and bad for like reasons.

VI.

"The District Court erred in not finding that, on the undenied facts shown by the papers on which defendants' motion to dissolve said supplemental decree was based, if said towel rack infringes the invention covered by the patent in suit, then, by reason of antedating said alleged invention, said patent is void." (Transcript, p. 61.)

Giving this assignment the benefit of every doubt which its obscure phraseology and its lack of particularity under the rule raises, it appears to be open to at least three fatal objections.

If it means (what it does not say) that the court below erred in refusing to consider a Patent (Rousso) alleged to have issued Oct. 19, 1915, appellants are bound by their want of proper diligence which would have enabled

them to discover its existence, if the fact was as alleged, before the trial.

Brill vs. North Jersey St. Ry. Co., 125 Fed. 526.

Panzl vs. Battle Island Paper and Pulp Co.,
132 Fed. 607.

If it means that the court below erred in refusing to consider an alleged application for patent only pending, there is no discoverable ground to support the allegation of error. Even in respect to the alleged Rousso patent that is, by reason of the lateness of its alleged date, no bar to the patent in suit.

The date of issue, not the filing date, determines whether or not one patent anticipates another.

Alvord *et al.* vs. Smith and Watson Iron Works *et al.*, 216 Fed. 150, 154 (Dist. Court Oregon) 1914.

If said assignment is an attempt on the part of appellants to set up the defense that the patent in suit is void, they are estopped by their Answer as well as by admission of their counsel in open court. (Transcript, p. 75.)

VII.

“That the entire proceedings of the District Court in the premises were erroneous and were to the prej-

udice of the substantial rights of the defendants, and resulted in an improvident use of the powers of said court." (Transcript, p. 61.)

Assignment of error in such general terms is believed to be condemned by every authority and precedent without exception.

One case, for example, should suffice:

P. P. Mast & Co. vs. Superior Drill Co., 154 Fed. 45.

See ruling therein on second, third, fourth and fifth Assignment of Error by Appellant, second paragraph, page 50.

In view of the foregoing it is respectfully submitted to the determination of this Honorable Court that the action of the Court below set forth in Petition on Appeal (Transcript, p. 62) is not reviewable; that the assignments of error are bad in form; and that no error unassigned appears of record.

Respectfully submitted,

JOSEPH L. ATKINS,
of Counsel for Appellee.

IN THE

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FOR THE

NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY,
a corporation, and
PERCY G. ALLEN,

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Appellee.

Filed

MAY 31 1913

F. D. Monckton

*Appeal from the District Court of the United States
for the District of Oregon.*

APPELLEE'S SUPPLEMENTAL BRIEF.

JOSEPH L. ATKINS,
Counsel for Appellee.

T. J. GEISLER,
Of Counsel for Appellants.

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} No. 2972

*Appeal from the District Court of the United States
for the District of Oregon.*

APPELLEE'S SUPPLEMENTAL BRIEF.

STATEMENT

This and a companion case in this Court, entitled Broadway Towel Supply Company, a corporation, and Amos Burg, Appellants, No. 2971, were tried as one in the Court below under stipulation that the evidence

should apply equally to both cases, and were heard as one on appeal in this Court.

Since, therefore, briefs have been filed in both cases here, and a Supplemental Brief has been filed in said case No. 2971, it would appear not out of order and economical of time to supplement the original brief herein by reference only to such points of difference between this case and its said companion as claim attention.

If that view is accepted, as, under the circumstances Counsel trusts it may be, this Honorable Court is requested in disposing of this case to take into consideration points of the Supplemental Brief filed in said case No. 2971 that are common to the present one, and in addition thereto, in any event, the following touching upon points of differentiation between the two cases.

This brief is filed under permission of this Court granted at the oral argument of this case.

POINTS DISCUSSED.

It appears well to consider the points of difference between this and case No. 2971 under two heads: first, the form and mode of the Appeal taken, and, second, the matter thereof.

I.

THE FORM AND MODE OF THE APPEAL.

This case and case No. 2971 proceeded, *pari passu*, to the point of entry of "Decree for Injunction and Accounting" (Transcript pp. 17-20) and reference to a Master (Transcript p. 20).

At that point the course of the two cases diverge, in consequence of plaintiff below (Appellee) having filed in this case a "Motion to Punish Defendants for Contempt." (Transcript pp. 20-21).

To that Motion Defendants made Answer (Transcript pp. 24-27), and, thereupon, the Court below entered what is entitled "Supplemental Decree" (Transcript pp. 29-31).

Said "Supplemental Decree" was followed by "Motion to Vacate" the same (Transcript pp. 31-32), and, at the same time by "Motion for leave to file Supplemental Answer" (Transcript pp. 46-47), accompanied by "Petition for leave to file Supplemental Answer and take Proofs thereon" (Transcript pp. 47-52), together with "Proposed Supplemental Answer" (Transcript pp. 53-56).

Said petition and motion were denied by the Court below in an order (Transcript pp. 57-58) in which is noted Plaintiffs' statement of their desire to appeal and the penalty of appeal bond fixed.

Denial of "Petition for leave to file Supplemental Answer" is made the subject of a separate order (Transcript pp. 58-59).

Petition on Appeal (Transcript p. 62), accompanied by presentation of "Assignment of Errors" (Transcript pp. 59-61) and by "Bond on Appeal" (Transcript pp. 63-65) was allowed under order dated April 20, 1916 (Transcript p. 63) and the bond was approved the day following (Transcript p. 65).

The Petition on Appeal (Transcript p. 62) reads, *inter alia*, as follows:

"The above named defendants, conceiving themselves aggrieved by the supplemental decree in the above-entitled suit entered March 21, 1916, whereby this Court did extend and continue the injunction herein issued pursuant to the interlocutory decree entered January 21, 1916, to a certain towel rack adopted and used by defendants since the entry of said interlocutory decree, and furthermore, conceiving themselves aggrieved by the order entered herein April 17, 1916, refusing to dissolve and vacate said supplemental decree on the motion of defendants based on their petition verified April 5, 1916;

THEREFORE, the defendants do hereby
appeal" * * *

Appeal appears from said petition to be directed against (1) entry of Supplemental Decree of March 21, 1916 (Transcript pp. 29-31), not against the Interlocutory Decree entered January 31, 1916.

(2) "Order denying Motion to vacate Supplemental Decree" (Transcript pp. 57-58) dated April 17, 1916.

It should be noted that the order last above referred to is identified as being based on petition "verified April 5, 1916" (Transcript p. 62—compare page 57).

RESTRICTED SCOPE OF APPEAL.

From the foregoing it appears that no final decree has been rendered by the Court below, and that the appeal is directed only against the Supplemental Decree of March 21, 1916 (Transcript pp. 29-31), and the

order Denying Motion to Vacate the same (Transcript pp. 57-58).

No appeal is taken from the "Decree for Injunction and Accounting," entered January 31, 1916 (Transcript pp. 17-20) and none from "Order denying defendants leave to file Supplemental Answer" (Transcript pp. 58-59).

The difficulty encountered by Counsel for Appellee in attempting to determine what the issue in this case, whether arrived at or not, is intended to be, has already been pointed out in Appellee's Brief.

That point need not be further enlarged upon. The aim of this Supplemental Brief is to indicate for the benefit of the Court certain matters that might appear to be included in the Assignment of Errors, but which are in fact excluded from review on this Appeal.

Appellants in their Brief (page 38) submit to consideration the scope of the Brown patent—the one in suit.

In reply, it is submitted that that question, if before this Court at all, is not raised broadly, because as will appear from examination of the several Assignments of Error, discloses no objection to the Decree of January 31, 1916 (Transcript pp. 17-20).

The Injunction therein granted is not affected because, for one sufficient reason, the Appeal was not taken within thirty days of its entry (Act of Congress, March 31, 1891, C. 517, Sec. 7, 26 Stat. 828).

If the supplemental decree of March 21, 1916 (Transcript pp. 29-31) referred to in Assignments of Error I and II involved an injunction "granted, continued, refused or dissolved" as (provided for in Act of

Congress March 3, 1911, C. 231, Sec. 129, 36 Stat. 1134—Supplemental to Act of March 31, 1891, above noted) it is doubtful whether Appeal thereunder is well taken in this case, since the Statute provides that “appeal must be *taken* within thirty days from the *entry*” of the order or decree appealed from. The record fails to show the date of “entry” of the Supplemental Decree (Transcript pp. 29-31) and fails to show that the appeal was “taken” within thirty days thereafter.

But this point is unimportant if, as Appellee regards it, said Supplemental Decree does not come under the provisions of said Statute. Said decree is upon “Motion to punish Defendants for Contempt” (Transcript pp. 20-21). Defendants’ Answer thereto (Transcript pp. 24-27) offers an explanation for violation of the injunction, and the Court below in said decree accepts it in condonement of the offense.

In Assignment of Error I (Transcript pp. 59-60) Appellants refer to said Decree as “extending and continuing the injunction” of January 31, 1916.

This statement appears to be incorrect. The decree is that a certain modified device, described therein (Transcript p. 29), “infringes” upon the patent in suit, and that it “*constitutes* a violation of the injunction heretofore granted and issued in this cause.”

The proceedings raise no question in regard to the injunction, and it stands in no wise affected by them.

II.

MATTER OF SUPPLEMENTAL DECREE.

In respect to the infringing modification (Transcript p. 29) printed cut inserted between pages 38 and

39 of the Transcript is assumed by Appellants to represent it. Objection is made to said cut that it is not in evidence; that it fails to make any complete or adequate showing of the object it is assumed to represent; and that, so far as it goes, the showing it makes fails to correspond with the description made by the Court of the modified device which was before the Court below at the hearing upon which the Supplemental Decree was granted (See Transcript p. 29).

In support of the decision rendered under contempt proceedings and the conclusion therein reached as reflected in said Supplemental Decree, counsel submits the following citations:

The attempt of a defendant who has been enjoined from infringement to see how near he can come to an infringement and escape it is not looked upon with favor by the Courts. That he acted under advice of counsel is no defense.

Calculagraph Co. vs. Wilson, 136 Fed. 196.

He should be careful to avoid other infringement.

Blair vs. Jeanette-McKee Glass Works, 161 Fed. 355.

Not excused by reason of the fact that the infringement was not an obvious one, and that defendants proceeded under advice of counsel.

Paxton vs. Brinton, 126 Fed. 542.

Not excused even though infringing device is made according to a junior patent.

Norton vs. Eagle Auto Can Co., 59 Fed. 137.

Applying Blanchard vs. Putnam, 8 Wall. 420.

In the following case before the Circuit Court of Appeals for the second circuit, the Court says:

“In deciding that the defendant had violated the injunction, the Court necessarily passed upon whether defendant had sold the valves, and whether the valves were an infringement of the Complainant’s patent.

Upon writ of error the Court cannot review questions of fact. Its review is confined to questions of law only.

This is the rule when contempt proceedings are under review.”

Christensen Engineering Co. vs. Westinghouse Air Brake Co., 135 Fed. p. 778 (2 C. C. A.).

Citing *in re* Debs, 154 U. S. 564.

Besette vs. Conkey Co., 194 U. S. 334.

Any other question that might be held to be raised by this appeal must, it is submitted, amount to specification as error of Refusal of new Trial.

Refusal by inferior Court to grant a new trial is not error.

Henderson vs. Moore, 9 U. S. (5 Cranch) 11.

Marine Ins. Co. vs. Hodgson, 10 U. S. (6 Cranch) 206.

Respectfully submitted,

JOSEPH L. ATKINS,

Counsel for Appellee.

IN THE
**United States Circuit Court
of Appeals**
FOR THE
NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY, a corporation, and PERCY G. ALLEN,
Appellants,

VS.

BROWN-MEYER COMPANY,
a corporation,

Appellee.

Filed

JUN 14 1917

F. D. Monckton
Clerk

On Appeal from the District Court of the United
States for the District of Oregon.

**APPELLANTS' REPLY BRIEF TO APPEL-
LEE'S SUPPLEMENTAL BRIEF.**

T. J. GEISLER,
of Counsel for Appellants

JOSEPH L. ATKINS,
Counsel for Appellee

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY, a corporation,
and PERCY G. ALLEN,
Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,

Appellee.

No. 2972

On Appeal from the District Court of the United
States for the District of Oregon.

APPELLANTS' REPLY BRIEF TO APPEL-
LEE'S SUPPLEMENTAL BRIEF.

ON THE MOTIONS.

The general questions of practice presented by appellee in this case are substantially the same as those presented in the companion case No. 2971, and have been met and disposed of by appellants in the latter.

The papers which appellee seeks to strike out, to-wit: "all included after line 6, page 31 to page 56 inclusive, of Transcript"—is the motion to vacate supplemental decree of March 21, 1916, and the affidavits and exhibits in support of same; also the motion for leave to file supplemental answer (Trans. p. 46), the petition therefor, and proposed supplemental answer.

All these papers were expressly stipulated (see Trans. 96) by appellee, as required in the Transcript, also certified to be correct, and the Clerk of District Court was authorized to certify same in the Transcript. See stipulation of parties, Trans., p. 100.

The appellee generously does not object the order denying motion to vacate, Trans., p. 57. Note, this order recites the very papers appellee would eliminate.

Like remarks apply to the order denying leave to file supplemental answer. Trans., p. 58.

The proposal of appellants to raise a new issue on the new device was certainly fair. It suggested the only feasible way of getting at the facts, unless appellee by its silence conceded the facts to be as stated by appellants in said moving papers.

With regard to the cavil of appellee as to the transcript not stating that the supplemental decree and order refusing to dissolve same, both appealed from, were *entered* in the court below:—

It is to be remembered that appellee's counsel collaborated in the preparation in brief form of the transcript in this case, and all done is stipulated as correct over his signature. Therefore is it not to be presumed, in the absence of even any contrary assertion, that the decree and order appealed from *were entered* on the date they were signed?

But really counsel for appellee is woefully forgetful of the record. Note that the *petition on appeal*, and *Order* allowing of same by the Hon. Chas. E. Wolverton, the District Judge, before whom all the matters came up, *expressly states that the said supplemental decree was "entered March 21, 1916,"* and that the *"order refusing to dissolve and vacate said supplemental decree was entered April 17, 1916."* Trans. 62.

All these recitals were admitted as correct by counsel for appellee by the stipuations on p. 96 and p. 100 of Trans. Appellee has even embodied the statements and admissions above referred to in the top part of page 4 of its Supplemental Brief.

ON THE MERITS.

The entire proceedings of appellee in the lower court, culminating in said supplemental decree, were an unwarranted and unlawful dilation of the claims of the patent in suit, in wanton disregard of the rights of the general public, as well as those of appellants.

And it culminated, furthermore, in making out an innocent device used by appellants, under license from another patentee, to be an infringement, by *forcing* such innocent device into a state never contemplated, and absurd.

As said in *Buzzell v. Andrews*, 25 Fed. 822, cited with approval by Judge Hazel in *Winslow v. Bronson*, 106 Fed. 178, 183, "*Though a device may be forced to operate like the plaintiffs, yet it is not an infringement if such use were not the object of its construction.*"

Appellants pray that in order to end this useless litigation, and save appellants from being further harassed, this court dispose of the entire matter on this

appeal by directing the court below also what decree ought to have been entered in the first instance, in accordance with the facts brought out on the trial, and now fully before this court. For such disposition by this court it is submitted authority is found in *Smith v. Vulcan Iron Works*, 165 U. S. 518, as supplemented by

Mast Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 494.

Pelton v. Williams, 235 Fed. 130, 135.

The technical invasion of appellee's alleged patent for the brief period appellants required to ascertain the nature of said alleged invention from the records at the Patent Office is trivial and imposed no tangible damage upon appellee; and, moreover, appellants, before suit was brought (see Answer, Trans. 12, and testimony of Allen, appellant, Trans. 87-90), in order to avoid this useless litigation, offered a relatively large sum—\$50, finally \$100—though the proofs show appellee would be entitled at most to merely a nominal sum for such technical invasion. *But appellee demanded \$300* (Trans. 87). The good faith of appellants in changing the device originally used, so as to avoid infringement, is also conceded in this suit. See testimony of Meyers of appellee, Trans. 71, and stipulation of counsel, Trans. 82. Appellee's conduct has been most inequitable throughout.

Respectfully submitted,

T. J. GEISLER,
Of Counsel for Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BROWN-MEYER COMPANY, a Corporation
APPELLEE

vs.

CRYSTAL LAUNDRY COMPANY, a Corporation,
and PERCY G. ALLEN
APPELLANTS

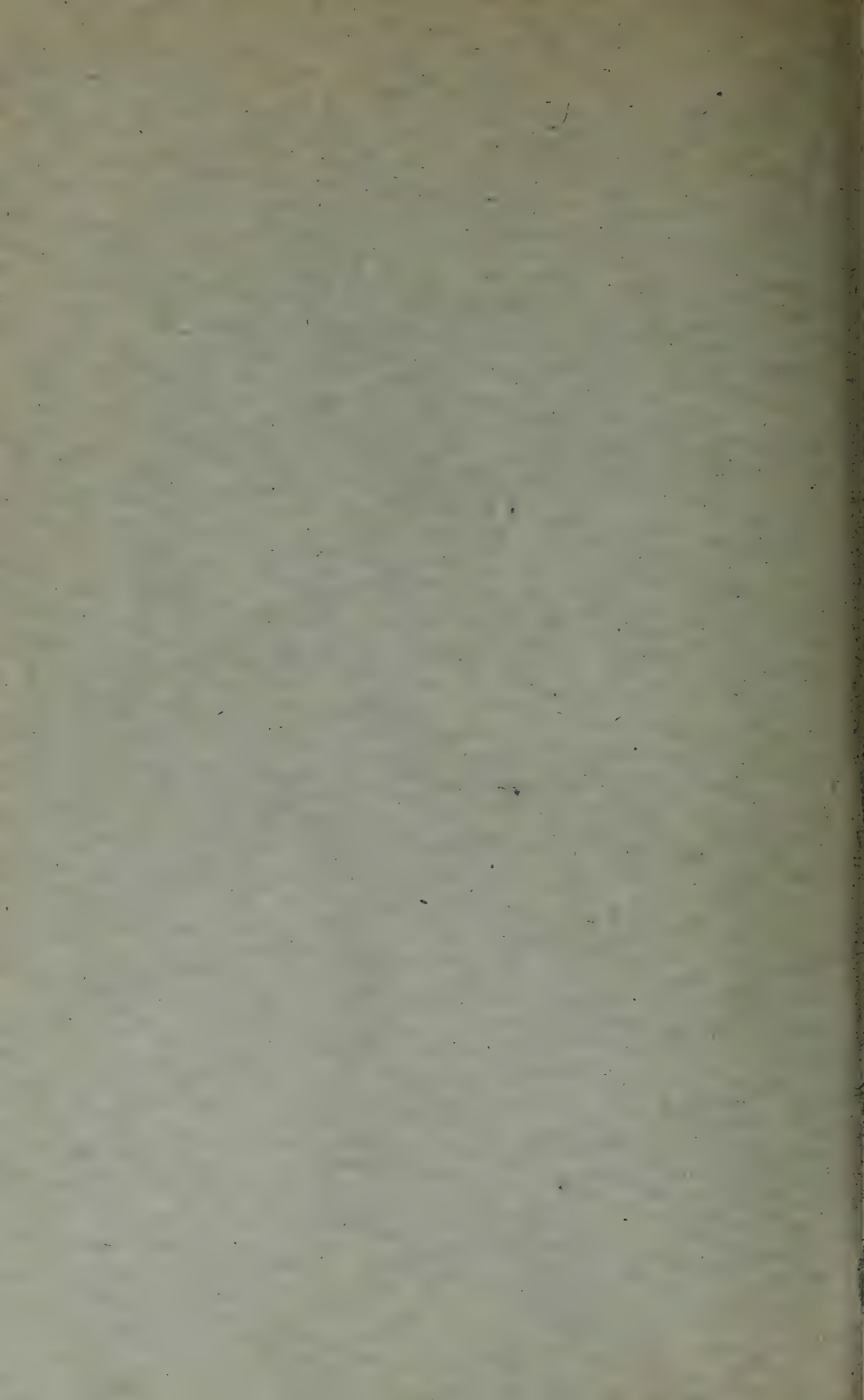
Petition for Rehearing

JOSEPH L. ATKINS,
Counsel for Petitioner

Filed

SEP 20 1907

F. D. Monckton,
Clerk.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BROWN-MEYER COMPANY, a corporation,
Appellee,

v.

CRYSTAL LAUNDRY COMPANY, a corporation,
and PERCY G. ALLEN,
Appellants.

Petition for Rehearing

*To the Honorable, the United States Circuit Court
of Appeals for the Ninth Circuit:*

Appellee petitions for a rehearing and humbly shows: The decision of this Honorable Court inflicts great injustice. It allows a decree and damages for infringement by appellants upon appellee's patent from November 3 to December 1, 1914, but holds that the infringement was discontinued after December 1, 1914, and thereupon reverses the decree of the Court below.

This petition is presented mainly upon the ground that the holding that appellants' device was changed after December 1, 1914, contradicts the record in the case.

This case, as is set forth in the opinion of the Court, is a companion case before this Court with Broadway Towel Supply Company, et al., appellants, v. Brown-Meyer Company, appellee, No. 2971.

It involves the same facts and in the main the decision in this case must follow that in the companion case.

There is one point in this case not common to the companion case, namely, the question of infringement of the patent in suit by appellants in the use of a certain device subsequent to the interlocutory decree.

This Honorable Court holds as of course, in view of its decision in the companion case, that the last-named device does not infringe. Whether that view will be adhered to must wait upon the final decision.

Your petitioner, therefore, while basing this petition upon grounds set up in the companion case, prays nevertheless that a rehearing may be allowed upon all points.

Counsel for petitioner hereby certifies that in his judgment this petition is well founded and that it is not interposed for delay.

And your petitioner will ever pray.

BROWN-MEYER COMPANY,

Petitioner,

By JOSEPH L. ATKINS,

Counsel,

United States
Circuit Court of Appeals
For the Ninth Circuit.

NAVY YARD ROUTE, a Corporation,
Plaintiff in Error,
vs.
H. E. DEVLIN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

Filed

JUL 25 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NAVY YARD ROUTE, a Corporation,
Plaintiff in Error,
vs.
H. E. DEVLIN,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer of Navy Yard Route	8
Assignments of Error	27
Certificate of Clerk U. S. District Court to Trans- cript of Record, etc.....	37
Citation on Writ of Error.....	39
Complaint	2
Judgment	16
Names and Addresses of Counsel	1
Notice and Waiver	24
Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond	28
Order Extending Time to and Including June 26, 1917, to File Bill of Exceptions, etc.....	19
Order Settling Bill of Exceptions	23
Petition for Writ of Error	25
Reply to Separate Answer of Defendant Navy Yard Route	12
Stipulation Extending Time to and Including June 26, 1917, to Prepare Bill of Excep- tions, etc.....	18
Stipulation and Order Extending Time to July 15, 1917, to File Record and Docket Cause.	33
Stipulation as to Contents of Bill of Exceptions.	20
Stipulation as to Contents of Printed Record..	35

Index.	Page
Stipulation Under Rule 23	43
Summons	6
Supersedeas Bond	30
Trial	14
Verdict	15
Writ of Error	40

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE,
a Corporation,

Defendants.

Names and Addresses of Counsel.

Messrs. MORRIS & SHIPLEY, Attorneys for
Plaintiff in Error,

Room 55 Haller Building, Seattle, Wash-
ington.

Messrs. BRONSON, ROBINSON & JONES, Attor-
neys for Plaintiff in Error,

614 Colman Building, Seattle, Washington.

PAUL S. DUBUAR, Esquire, Attorney for Plain-
tiff in Error,

55 Haller Building, Seattle, Washington.

FRANK E. GREEN, Esquire, Attorney for De-
fendant in Error,

228 Burke Building, Seattle, Washington.

[1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE,
a Corporation,

Defendants.

Complaint.

Comes now plaintiff and for cause of action
against the defendants alleges:

I.

That the defendant Puget Sound Navigation Company is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business in the City of Seattle, King County, State of Washington, and has been such during all the times referred to herein.

II.

That the defendant Navy Yard Route is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Seattle, King County, State of Washington, and has been such during all the times referred to herein.

III.

That during all the times referred to herein the

defendants owned and operated that certain steamship "Flyer."

IV.

That during the month of October, 1916, the plaintiff was employed as steward on the steamship "Bremerton," which steamship was then carrying freight and passengers to and from various ports on Puget Sound, one of which ports was the town or City of Charleston, [2] Kitsap County, Washington.

V.

That on or about the 24th day of October, 1916, while the plaintiff was engaged in his duties as steward as aforesaid, and while standing between the stern and amidships on the port side guard of said steamship "Bremerton," which said guard extended out several inches from the hull of said steamship and was situated above and near the water line thereof; and while said steamship "Bremerton" was proceeding on her course from the aforesaid port of Charleston, the defendants operated and managed the said steamship "Flyer" in such a grossly reckless, careless, and negligent manner that said steamship "Flyer" rammed her stern against, upon, and into the part of the said steamship "Bremerton" where plaintiff was then standing, and upon and against plaintiff; from all of which plaintiff's right thigh was cut, torn, and lacerated, and the bone thereof was fractured and splintered and plaintiff's right leg was cut, lacerated, torn, and crushed, and plaintiff's right ankle and foot were sprained, cut, lacerated, and torn,

and plaintiff's nose was broken, lacerated and torn, and plaintiff received a large number, too numerous to mention, of cuts, lacerations, tears and bruises on various parts of his body, and plaintiff suffered other grievous injuries the full extent of which are as yet to plaintiff unknown, and plaintiff suffered intense mental anguish and physical pain, and has so continued to suffer ever since, and still so suffers, and plaintiff alleges the fact to be that his aforesaid injuries are of a permanent nature from which he will never recover.

VI.

That on account of the aforesaid injuries plaintiff was taken to a hospital where he is still confined, and has incurred expenses for said hospital service up to the present time in the sum of Two Hundred Twenty-five Dollars (\$225.00), and alleges that he will have to incur further hospital expenses in a sum of not less than One Hundred Fifty Dollars (\$150.00). [3]

VII.

That on account of the aforesaid injuries the plaintiff was compelled to employ physicians and surgeons and has incurred expenses up to the present time therefor in the sum of Five Hundred Dollars (\$500.00), and alleges that he will have to incur further expenses for the same reason in a sum of not less than Two Hundred and Fifty Dollars (\$250.00).

VIII.

That at the time of plaintiff's aforesaid injuries he was a strong, healthy, robust man, of the age of

41 years, with a life expectancy of about 28 years, capable of earning and did earn about Seventy Dollars per month; that on account of said injuries he has been unable to earn anything whatsoever from the time of said injuries up to the present time, and alleges that he will not be able to earn anything for a long time to come, and that his earning capacity has been greatly reduced for the remainder of his lifetime.

IX.

That on account of the aforesaid injuries; on account of the mental anguish and physical suffering; on account of the expenditures incurred and to be incurred by plaintiff; on account of lost earnings and permanently reduced earning capacity; and on account of his permanent injuries he has been damaged in a total sum of Twenty Thousand Dollars (\$20,000.00), no portion of which has been paid and all of which is now due him.

WHEREFORE plaintiff prays the Court for judgment against the defendants and each of them in the sum of Twenty Thousand Dollars (\$20,000.00), and for his costs and disbursements in this action and such other relief as it may please the Court to grant him.

FRANK E. GREEN,
Attorney for Plaintiff. [4]

United States of America,
Western District of Washington,—ss.

H. E. Devlin, first having been duly sworn, on oath deposes and says: That he is the plaintiff in

the above-entitled action; that he has heard the foregoing complaint and knows the contents thereof and believes the same to be true.

H. E. DEVLIN.

Subscribed and sworn to before me this 17th day of February, 1917.

FRANK E. GREEN,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Complaint. Filed in the U. S. District Court, Western District of Washington, Northern Division. Feb. 20, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [5]

UNITED STATES OF AMERICA,

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE,
a Corporation,

Defendants.

Summons.

The President of the United States of America,
Greeting: To the Above-named Defendants,
Puget Sound Navigation Company, a Corporation,
and Navy Yard Route, a Corporation.

You are hereby required to appear in the United

States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court, in the City of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Hon JEREMIAH NETERER, Judge of said Court, this 20th day of February, in the year of our Lord one thousand nine hundred and seventeen, and of our Independence the one hundred and forty-first.

[Seal]

FRANK L. CROSBY,
Clerk.

By _____,
Deputy Clerk. [6]

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within Puget Sound Navigation Company, a corporation, by serving Frank E. Burns, Resident Agent, and on the Navy Yard Route, a corporation, by serving A. J. Webb, Managing Agent, all at Seattle, on the 20th day of February, 1917.

Fees \$4.24.

JOHN M. BOYLE,
U. S. Marshal.
By Donald D. Fullen,
Deputy.

[Endorsed]: Summons. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 21, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [7]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE,
a Corporation,

Defendants.

Answer of Navy Yard Route.

Comes now defendant Navy Yard Route, and for answer to plaintiff's complaint herein, says and alleges as follows:

I.

Answering Paragraphs I and II, defendant admits the same.

II.

Answering Paragraph III, this defendant admits that it operated the steamship "Flyer," but denies that it owned the same.

III.

Answering Paragraph IV, this defendant admits the same.

IV.

Answering Paragraph V, this defendant admits that plaintiff was injured in a collision between the steamers "Flyer" and "Bremerton" at the time and place therein mentioned; this defendant specifically denies that the defendants or either of them, operated the steamer "Flyer" in a grossly reckless, careless and negligent manner, or in any reckless, careless or negligent manner; with reference to the allegations as to the particulars of plaintiff's injury, contained in said paragraph, this defendant has no knowledge or information sufficient to form a belief as to the truth or falsity thereof, and it therefore denies each and all of said [8] allegations; defendant denies all the other allegations contained in said paragraph.

V.

Answering Paragraph VI, defendant has no knowledge or information sufficient to form a belief as to the truth or falsity thereof, and defendant therefore denies each and every allegation therein contained.

VI.

Answering Paragraph VII, defendant has no knowledge or information sufficient to form a belief as to the allegations therein contained, and it therefore denies each and every allegation therein contained.

VII.

Answering Paragraph VIII, defendant has no knowledge or information sufficient to form a belief as to the truth or falsity thereof, and it therefore

denies each and every allegation therein contained.

VIII.

Answering Paragraph IX, this defendant denies that plaintiff has been damaged in the sum of \$20,000, or in any sum; defendant admits that it has not paid plaintiff any portion of the sum claimed by plaintiff; defendant denies that any sum is due plaintiff, and defendant denies all the other allegations contained in said paragraph.

FIRST AFFIRMATIVE DEFENSE.

For a first affirmative defense this defendant alleges:

I.

That the plaintiff's injury was caused wholly and solely by the negligence of the persons operating the steamer "Bremerton," who, in open water and in full daylight, so recklessly and [9] carelessly navigated said steamer "Bremerton" as to bring her into collision with the steamer "Flyer," as the said steamer "Flyer" was in a lawful and careful manner backing away from the dock at Charleston.

SECOND AFFIRMATIVE DEFENSE.

For a second and further affirmative defense this defendant alleges:

I.

That at the time and place in question, plaintiff failed to exercise proper care and caution, and that the negligence of plaintiff was the moving cause of his injury, if any, and that the same contributed thereto, and that said injuries, if any, would not

have resulted except for the fault and negligence of plaintiff.

WHEREFORE, having fully answered, this defendant prays that this action be dismissed, and that it recover its costs herein.

MORRIS & SHIPLEY,

PAUL S. DUBUAR,

Attorneys for Defendant Navy Yard Route.

State of Washington,

County of King,—ss.

H. B. Kennedy, being first duly sworn, on oath says: That he is the President of the Navy Yard Route, and that he makes this verification for and on behalf of said defendant corporation, and that he is authorized so to do; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

H. B. KENNEDY.

Subscribed and sworn to before me this 12th day of April, 1917.

[Notarial Seal]

PAUL S. DUBUAR,

Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within Answer and receipt of copy admitted this 12th day of April, 1917.

FRANK E. GREEN,

Attorney for Plaintiff.

[Endorsed]: Answer of Navy Yard Route. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [10]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

**Reply to Separate Answer of Defendant Navy Yard
Route.**

Comes now plaintiff and replying to the affirmative defenses set up in the separate answer of the defendant Navy Yard Route says:

I.

Referring to the first affirmative defense thereof, he denies each and every allegation therein contained.

II.

Referring to the second affirmative defense thereof, he denies each and every allegation therein contained.

WHEREFORE plaintiff prays the Court for judgment according to his complaint.

FRANK E. GREEN,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

H. E. Devlin, first having been duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled cause; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

H. E. DEVLIN,

Subscribed and sworn to before me this 12th day of April, 1917.

[Seal]

FRANK E. GREEN,

Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within Reply and receipt of copy admitted this 13th day of April, 1917.

MORRIS & SHIPLEY,

Attorneys for Dft. Navy Yard Route. [11]

[Endorsed]: Reply to Separate Answer of Defendant Navy Yard Route. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 13, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [12]

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION CO., et al.,
Defendants.

Trial.

Now on this day this cause comes on for trial in open court, the plaintiff being represented by Frank E. Green and the defendants represented by Bronson, Robinson and Jones and Morris & Shipley. Whereupon a jury is called and come and answer to their names as follows: Andrew Naslund, John Leyden, A. J. Goddard, B. Roy Anderson, L. P. Baumann, W. W. Judd, E. Josephine Cook, Rudolph Nordhoff, K. C. Kerr, T. E. Headlee, W. F. Leavell, F. J. Herberger, twelve good and lawful persons duly empaneled and sworn, whereupon opening statement is made by counsel for plaintiff and the following witnesses examined: H. E. Devlin, Roscoe Hogue, Frank N. Kannapell, Claude Perkins, Dr. Wm. Teepest, Dr. Everett O. Jones, and introduction of Exhibits, "A," "B," "C," "D," "E," "F," "G" and "H." The hour of adjournment having arrived, by consent of counsel the trial is continued until May 29, 1917, at 10:00, and the jury being cautioned by the Court they are allowed to separate until that hour.

Dated May 25, 1917.

Journal 6, page, 171. [13]

*In the District Court of the United States for the
Western District of Washington.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the Navy Yard Route, a corporation, and assess his damages at the sum of \$4,750, and find in favor of the defendant Puget Sound Navigation Company.

E. JOSEPHINE COOK,

Foreman.

[Endorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 1, 1917. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [34]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Judgment.

The above-entitled cause having come on for trial on the 25th, 28th, and 31st, days of May, 1917, and the plaintiff being represented by Frank E. Green, his attorney, and the defendant Navy Yard Route, a corporation, by its attorneys Morris & Shipley, and Paul S. Dubuar, and the defendant Puget Sound Navigation Company, a corporation, by Bronson, Robinson & Jones, its attorneys, and a jury having been duly impaneled and sworn to try said cause, and said cause having been tried by said jury and all the evidence on behalf of both parties having been submitted, and the Court having instructed the jury and after argument by respective counsel said cause was submitted to the jury and the jury thereupon retired, and after due consideration of said cause, brought in a verdict on the first day of June, 1917, for the plaintiff in the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750) against the defendant Navy Yard Route, a corporation, and

upon instructions of the Court a verdict in favor of the defendant Puget Sound Navigation Company, a corporation.

NOW, THEREFORE, on motion of Frank E. Green, attorney for plaintiff, in said cause, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that by reason of the law, and the aforesaid verdict, the plaintiff H. E. Devlin do have and recover of and from the defendant Navy Yard Route, a corporation, the sum of Four Thousand [35] Seven Hundred Fifty Dollars (\$4,750), with interest thereon at the rate of six per cent per annum until paid from June 1, 1917, together with plaintiff's costs and disbursements incurred in this action to be taxed, and that plaintiff take nothing against the defendant Puget Sound Navigation Company, a corporation; and that said Puget Sound Navigation Company, a corporation, have judgment against the plaintiff for its costs to be taxed.

Done in open court at Seattle, Washington, this 6th day of June, 1917.

JEREMIAH NETERER,
Judge.

[Endorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 6, 1917, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [36]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

**Stipulation Extending Time to and Including June
26, 1917, to Prepare Bill of Exceptions, etc.**

It is hereby stipulated between attorneys for plaintiff and for defendants that the defendant Navy Yard Route shall have to and including the 26th day of June, 1917, in which to prepare and serve upon plaintiff the draft of its proposed bill of exceptions in said cause, and that plaintiff shall have ten days thereafter in which to prepare and serve its proposed amendments, if any, to said proposed bill of exceptions.

Dated at Seattle, Washington, this 6th day of June, 1917.

FRANK E. GREEN,

Attorney for Plaintiff.

MORRIS & SHIPLEY,

BRONSON, ROBINSON & JONES,

PAUL S. DUBUAR,

Attorneys for Defendant Navy Yard Route.

[Endorsed]: Stipulation Fixing Time to Prepare Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [37]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

**Order Extending Time to and Including June 26,
1917, to File Bill of Exceptions, etc.**

Upon stipulation of the parties plaintiff and defendants filed herein, it is hereby ordered and adjudged that defendant Navy Yard Route do have to and including Tuesday the 26th day of June, 1917, in which to prepare and serve upon defendant and file its proposed bill of exceptions in this cause, and that plaintiff have ten days thereafter in which to prepare, serve and file his proposed amendments thereto.

Dated at Seattle, Washington, this 16th day of June, 1917.

JEREMIAH NETERER,
Judge.

O. K.—FRANK E. GREEN,
Atty. for Plaintiff.

[Endorsed]: Order Fixing Time to File Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [38]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Stipulation as to Contents of Bill of Exceptions.

It is stipulated and agreed between the said plaintiff H. E. Devlin, by Frank E. Green, his attorney, and the defendant Navy Yard Route, by Morris & Shipley, its attorneys:

1. That defendant Navy Yard Route has waived and hereby waives certain assignments of error, to wit: Assignments Nos. 2, 3, 5, 7, 9 and 10 embraced in the assignments of error filed herein;

2. That in the event of the writ of error issued in this cause being perfected, and the cause being heard in the Circuit Court of Appeals thereon, that no question will be raised as to the sufficiency of the evidence concerning the facts involved so far as the movements and operation of the steamboats "Flyer" and "Bremerton," or of the collision between the same, or the extent or character of plaintiff's injury, or as to which of said two boats was responsible for the collision, and that for the purpose of reducing the printed record, all testimony offered on the trial relating to said subjects, not copied in the bill of exceptions, be, and the same is omitted as irrelevant, and the proposed bill of exceptions heretofore served shall be settled, signed and certified as containing all the evidence and testimony offered and [39] received upon the trial, and that the Court's instructions to the jury be omitted from the bill of exceptions, no exceptions being taken thereto;

3. That all maps, photographs and exhibits introduced in evidence during the trial and marked plaintiff's and defendants' exhibits respectively, and forming a part of the evidence on the trial in the above-entitled cause, be omitted from the bill of exceptions, and not copied into the bill of exceptions, but that said bill of exceptions for all purposes be considered to have sufficiently incorporated the same therein by appropriate reference thereto as shown in said proposed bill of exceptions, and that the original exhibits be retained in the custody of the Clerk of said Court, and be not forwarded to

the Circuit Court of Appeals in connection with the record herein, and that the record be treated as complete without the production thereof;

4. That the proposed bill of exceptions, omitting the Court's instructions therefrom, heretofore served upon plaintiff Devlin, by defendant Navy Yard Route, be signed, settled and certified by the Court, as a true, correct and complete bill of exceptions herein, and that the certificate attached thereto, be signed upon presentation to the Court following the signing of the stipulation.

Dated at Seattle, Washington, this 29th day of June, 1917.

FRANK GREEN,

Attorney for Plaintiff.

MORRIS & SHIPLEY,

Attorneys for Defendant Navy Yard Route.

[Endorsed]: Stipulation as to Contents of Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 2, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [40]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Order Settling Bill of Exceptions.

The application of defendant Navy Yard Route to have its proposed bill of exceptions heretofore served, settled, allowed and certified by the Court, came on duly to be heard this day, and it appearing to the Court that a stipulation has been duly entered into by the respective parties, and filed herein, stipulating that defendant Navy Yard Route, proposed bill of exceptions so submitted to the Court, be settled, signed and certified, and the Court being fully advised in the premises, and in accordance with the stipulation of the parties so entered into, it is hereby ordered that the bill of exceptions so presented by defendant Navy Yard Route, be, and the same is hereby allowed, settled and certified as the bill of exceptions in this cause.

Done in open Court this 2d day of July, 1917.

JEREMIAH NETERER,

Judge.

Receipt of copy of foregoing order, and consent to the signing of the same is hereby acknowledged.

FRANK E. GREEN,

Attorney for Plaintiff H. E. Devlin.

[Endorsed]: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 2, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[41]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Notice and Waiver.

To the Puget Sound Navigation Company, a Corporation, Defendant:

You are hereby notified that the Navy Yard Route, a corporation, one of the defendants in the above numbered and entitled cause, will, upon the 6th day of June, 1917, present and file herein its petition for a writ of error in the above-entitled cause, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above numbered and entitled cause, rendered in favor of said plaintiff and against this defendant Navy Yard Route, and you are hereby invited to join this defendant in suing out and prosecuting a writ of error herein, or you will be deemed to have acquiesced in said judgment as entered, and the Navy Yard Route will prosecute said writ of error without joining you as a party.

MORRIS & SHIPLEY and
PAUL S. DUBUAR,

Attorneys for Defendant Navy Yard Route.

Service of the foregoing notice is accepted by defendant Puget Sound Navigation Company, this 6th day of June, 1917, and [42] all right to sue out a writ of error or of joining therein or being a party thereto is hereby expressly waived, and consent is hereby entered to the issuance and prosecution of a writ of error herein by defendant Navy Yard Route without this defendant being made a party thereto.

BRONSEN, ROBINSON & JONES,
Attorneys for Defendant Puget Sound Navigation Company.

[Endorsed]: Notice and Waiver. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 27, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [43]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Petition for Writ of Error.

Comes now the Navy Yard Route, a corporation, one of the defendants in the above numbered and entitled cause, and says:

That on or about the 6th day of June, 1917, this Court entered a judgment herein in favor of the plaintiff, H. E. Devlin, against this defendant Navy Yard Route, a corporation, and in favor of the defendant Puget Sound Navigation Company, a corporation, dismissing said action as against it and for costs against plaintiff, in which judgment against this defendant, and the proceedings prior thereto in this cause, certain errors were committed to the prejudice of this defendant Navy Yard Route, and of which more in detail appears from the assignments of errors filed with this petition.

WHEREFORE, this defendant Navy Yard Route prays that a writ of error issue in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
WILL H. MORRIS,
S. M. SHIPLEY,
PAUL S. DUBUÁR,

Attorneys for Defendant Navy Yard Route.

[Endorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist., of Washington, Northern Division. June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [44]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Assignments of Error.

Now comes the defendant Navy Yard Route, a corporation, one of the defendants in this action, in connection with its petition for a writ of error in the above-entitled cause, and makes the following assignments of error, which it avers occurred upon the trial of said cause, and proceedings therein, as follows:

11. Error in entering judgment upon the verdict herein in favor of plaintiff against defendant Navy Yard Route. [47]

12. That the averments contained in the pleadings and the evidence submitted at the trial as shown by the record are insufficient to sustain or support the verdict against this defendant, and that under the law applicable thereto judgment was erroneously entered.

13. That the judgment entered herein in favor of plaintiff against defendant Navy Yard Route is con-

trary to the law and the evidence.

14. In permitting this cause to be submitted to the jury, in receiving and filing the verdict of the jury, and in entering judgment thereon, as contrary to law, under the averments and proof as shown by the record.

WHEREFORE, defendant Navy Yard Route, prays that said judgment be reversed.

MORRIS & SHIPLEY,

BRONSON, ROBINSON & JONES and

PAUL S. DUBUAR,

Attorneys for Defendant Navy Yard Route.

[Endorsed]: Assignment of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [48]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

**Order Allowing Writ of Error and Fixing Amount
of Supersedeas Bond.**

On this 6th day of June, 1917, came the defend-

ant Navy Yard Route, a corporation, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance for a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said defendant Navy Yard Route giving bond according to law, in the sum of Ten Thousand Dollars, which shall operate as a supersedeas bond, and a bond for costs.

JEREMIAH NETERER,

Judge.

[Endorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[49]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision,*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, Navy Yard Route, a corporation, as principal, and H. B. Kennedy and Joshua Green, as sureties, are held and firmly bound unto the above-named plaintiff H. E. Devlin, defendant in error, in the full and just sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, to be paid to the said H. E. Devlin, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of June, 1917.

The condition of this obligation is such that:

WHEREAS, lately at a term of the District Court of the United States, for the Western District of Washington, Northern Division, in a suit pending

therein between the above parties, plaintiff and defendants, a judgment was rendered in favor of said plaintiff Devlin, against the defendant Navy Yard Route, dated June 6, 1917, for the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750) together with costs taxed therein, and interest from June 1, 1917, at 6% per annum, and the said defendant Navy Yard Route, having [50] obtained a writ of error and filed a copy thereof in the office of the Clerk of said Court, to reverse said judgment and a citation in due form directed to said H. E. Devlin, citing him to be and appear in the Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date thereof, and the Court having fixed the amount of the bond to be given by said Navy Yard Route, plaintiff in error to operate as a supersedeas bond, and to supersede said judgment, at the sum of Ten Thousand Dollars (\$10,000) upon agreement of counsel of said parties as to the amount thereof, made in open Court;

NOW, THEREFORE, this obligation is further conditioned that if said bounden principal Navy Yard Route, plaintiff in error, shall prosecute its said writ of error to effect, and answer all damages, costs and accrued costs, and pay said judgment and costs, if it fails to make its plea and writ of error good, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed the date above written:

NAVY YARD ROUTE, (Seal)

Principal.

By H. B. KENNEDY,

President.

[Seal] Attest:

JOSHUA GREENE,

Secretary.

H. B. KENNEDY, (Seal)

JOSHUA GREENE, (Seal)

Sureties.

United States of America,
Western District of Washington,—ss.

H. B. Kennedy and Joshua Green, each being first duly sworn, of oath says: That he is one of the sureties above named; that he is a resident and freeholder of and in the Northern Division [51] of the Western District of Washington, and is personally worth in separate property, situated therein, a sum in excess of Twenty Thousand Dollars (\$20,000) over and above all his just debts and liabilities, exclusive of property exempt from execution.

[Seal]

H. B. KENNEDY.

JOSHUA A. GREENE,

Subscribed and sworn to before me this 6th day of June, 1917.

PAUL S. DUBUAR,

Notary Public in and for the State of Washington,
Residing at Seattle.

Sufficiency of sureties approved.

FRANK E. GREEN,

Attorney for Plaintiff.

Within bond accepted and approved this 6th day of June, 1917.

JEREMIAH NETERER,

District Judge.

[Endorsed]: Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [52]

The United States Circuit Court of Appeals for the Ninth Circuit.

No. 3560.

NAVY YARD ROUTE, a Corporation,

Plaintiff in Error,

vs.

PUGET SOUND NAVIGATION COMPANY, a Corporation,

Defendant.

H. E. DEVLIN,

Defendant in Error.

Stipulation and Order Extending Time to July 15, 1917, to File Record and Docket Cause.

It is hereby stipulated and agreed between the plaintiff in error, by its counsel, and defendant in error, by his counsel, that the time within which the clerk of the District Court is required to prepare and file the record in this cause in the Circuit Court of Appeals, shall be extended to and including the

15th day of July, 1917, and that an order be entered accordingly.

MORRIS & SHIPLEY,
Attorneys for Plaintiff in Error.

FRANK GREEN,
Attorney for Defendant in Error.

The foregoing stipulation being presented to the undersigned, the Judge who signed and granted the writ of error and citation in this cause, and it appearing that sufficient cause exists to justify the extension of time within which the clerk of the District Court be required to prepare and certify, and the plaintiff in error to file in the Circuit Court of Appeals, the record in this cause as stipulated, therefore, it is by the Court ordered that said period of time be, and the same is hereby extended until July 15th, 1917.

Dated this 2d day of July, 1917.

JEREMIAH NETERER,
Judge.

[Endorsed]: Stipulation Extending Time for Filing Record in Circuit Court of Appeals, and Order. Filed in the U. S. District Court, Western [56] Dist. of Washington, Northern Division. July 2, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [57]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Stipulation as to Contents of Printed Record.

It is hereby stipulated by and between plaintiff
H. E. Devlin, defendant in error, and defendant
Navy Yard Route, plaintiff in error, by their re-
spective counsel, that there shall be embraced in the
record made and returned by the clerk of said Court
to the Circuit Court of Appeals and printed as the
printed record upon which this cause shall be heard
on writ of error in the Circuit Court of Appeals,
the following only:

Complaint and summons;

Separate answer of Navy Yard Route;

Reply of plaintiff thereto;

Journal record of trial and empaneling of jury;

Bill of exceptions;

Verdict;

Judgment of the Court;

Stipulation fixing time for filing proposed bill of
exceptions;

Order thereon;

Stipulation as to contents of bill of exceptions;
Order settling bill of exceptions;
Notice to and waiver by defendant Puget Sound
Navigation Co.;
Petition for writ of error;
Assignments of error;
Order allowing writ of error and fixing supersedeas
bond;
Writ of error;
Citation in error;
Supersedeas bond and approval;
This stipulation as to contents of printed record;
Certificate of clerk to transcript of record;
“Original” Writ of error;
“Original” Citation.
Stipulation and Order extending time filing record.
Dated at Seattle, Washington, this 2d day of July,
1917.

MORRIS & SHIPLEY,
Attorneys for Defendant Navy Yard Route, Plain-
tiff in Error.

FRANK GREEN,
Attorney for Plaintiff H. E. Devlin, Defendant in
Error. [58]

[Endorsed]: Stipulation as to Contents of Printed
Record. Filed in the U. S. District Court, Western
Dist. of Washington, Northern Division. July 2,
1917. Frank L. Crosby, Clerk. By Ed M. Lakin,
Deputy. [59]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3560.

NAVY YARD ROUTE, a Corporation,
Plaintiff in Error,

vs.

H. E. DEVLIN,
Defendant in Error.

**Certificate of Clerk U. S. District Court to
Transcript of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing pages, numbered from 1 to 59, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as the same remain of record and on file in the office of the clerk of said Court, and as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, as stipulated for by counsel of record herein, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [60]

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 140 folios at 15¢	\$21.00
Certificate of Clerk to transcript of record, 4 folios at 15¢ .....	.60
Seal to said Certificate.....	.20
	<hr/>
	\$21.80

I hereby certify that the above cost for preparing and certifying record, amounting to \$21.80, has been paid to me by the attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of July, 1917.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [61]

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3560.

Citation on Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to H. E. Devlin,
Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein Navy Yard Route, a corporation is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. D. WHITE, Chief Justice of the United States, this 6th day of June, A. D. 1917.

[Seal]

JEREMIAH NETERER,
United States District Judge.

Received copy of the above citation this 6th day of June, 1917.

FRANK E. GREEN,
Attorney for Plaintiff.

Received copy of the above citation this 6th day of June, 1917.

BRONSON,
ROBINSON,
JONES. [62]

[Endorsed]: 3560. Original. United States Circuit Court of Appeals for the Ninth Circuit. H. E. Devlin, Plaintiff, vs. Puget Sound Navigation Co., et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [63]

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3560.

H. E. DEVLIN,

Plaintiff,

vs.

PUGET SOUND NAVIGATION COMPANY, a
Corporation, and NAVY YARD ROUTE, a
Corporation,

Defendants.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in

the rendition of the judgment, of a plea which is in said Circuit Court before you, or some of you, between H. E. Devlin, plaintiff, and Navy Yard Route, a corporation, defendant, a manifest error it is claimed hath happened to the great damage of the said Navy Yard Route, a corporation, defendant, as by its complaint appears, we being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said circuit within thirty [64] days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable E. D. WHITE, Chief Justice of the United States, this 6th day of June, A. D. 1917.

[Seal]

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Deputy.

Allowed by

JEREMIAH NETERER,
Judge. [65]

[Endorsed]: 3560. Original. United States Circuit Court of Appeals for the Ninth Circuit. H. E. Devlin, Plaintiff, vs. Puget Sound Navigation Co., et al., Defendants. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [66]

[Endorsed]: No. 3019. United States Circuit Court of Appeals for the Ninth Circuit. Navy Yard Route, a Corporation, Plaintiff in Error, vs. H. E. Devlin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 13, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

NAVY YARD ROUTE, a Corporation,

Plaintiff in Error.

PUGET SOUND NAVIGATION COMPANY, a
Corporation,

Defendant,

vs.

H. E. DEVLIN,

Defendant in Error.

Stipulation Under Rule 23.

It is hereby stipulated and agreed by and between plaintiff in error, and defendant in error, by their respective counsel, as follows:

Plaintiff in error having notified defendant in error of its intention to raise and present in the Circuit Court of Appeals, a question of jurisdiction in the District Court of this cause, because of the absence of any allegation or showing in the pleadings or record as to the domicile, residence or citizenship of defendant in error, plaintiff below, whatsoever, as shown by the record and transcript herein filed in the Circuit Court of Appeals by plaintiff in error; and counsel for the respective parties hereby stipulate that the pleadings and entire record of this cause in the Court below and the record in the Circuit Court of Appeals are silent and contain no showing concerning the domicile, residence or citi-

zenship of the plaintiff below, defendant in error herein, by reason of which facts counsel for the respective parties considering the printing in the record of those portions of the assignments of error, bill of exceptions and evidence, presenting questions as to the admissibility of evidence offered and rejected, not to be essential for the hearing of this cause in the Circuit Court of Appeals, and in order to save costs of printing, it is therefore stipulated:

That the question of jurisdiction so raised by plaintiff in error is the question on which it intends to rely, and that all assignments of error relating to the introduction or rejection of evidence or to the weight or sufficiency of evidence, on all questions other than relating to the jurisdiction of the District Court, be, and are waived; and that the Clerk of the Circuit Court of Appeals shall omit from the printed record the bill of exceptions, containing the evidence, and those portions of the assignments of error based upon introduction and rejection of evidence, and shall print only the last four assignments of error in the printed record, and that the stipulation heretofore entered into specifying the portions of the transcript of record to be printed, be, and the same is modified as above stipulated;

It is further stipulated that no advantage shall be taken or objection interposed in the Circuit Court of Appeals to the failure to print the entire record contained in the transcript filed in the Circuit Court of Appeals by plaintiff in error.

Dated at Seattle, Washington, this 13th day of July, 1917.

WILL H. MORRIS,
SILAS M. SHIPLEY,
PAUL S. DUBUAR,

Attorneys for Plaintiff in Error.

FRANK E. GREEN,
Attorney for Defendant in Error.

[Endorsed]: No. 3019. Original. In the United States Circuit Court of Appeals, Ninth Circuit. Navy Yard Route, a Corporation, Plaintiff in Error; Puget Sound Navigation Company, a Corporation, Defendant, vs. H. E. Devlin, Defendant in Error. Stipulation as to Printing Record. Filed Jul. 16, 1917. F. D. Monckton, Clerk.

6-10

